Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROSE DESIA, TRUSTEE OF THE BARBARA BESS TRUST F/B/O JULIUS SOLOMON, PETITIONER

v.

GE LIFE AND ANNUITY ASSURANCE COMPANY AND A.G. EDWARDS & SONS, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COSTANTINO FRAGALE
575 White Plains Road
Eastchester, NY 10709
(914)337-4001

DENNIS P. DERRICK
Counsel of Record
7 Winthrop Street
Essex, MA 01929
(978) 768-6610
dennisderrick@comcast.net

CURRY & TAYLOR ♦ 202-393-4141

QUESTIONS PRESENTED

1. Is petitioner's right to a jury trial on contested fact issues usurped when upon summary judgment the federal courts below rely only on credibility in order to extinguish every genuine issue of material fact adduced by the non moving party?

2. Is it a question of exceptional importance to the federal system that Rule 56's decisionmaking principles be restated by this Court so that federal courts will no longer engage in making credibility determinations upon summary judgment in order to resolve triable issues of material fact and prevent jury trials?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 4

REASONS FOR GRANTING THE PETITION 17

CONCLUSION 27

APPENDIX

Circuit Court Decision 1a
District Court Memorandum of Decision 6a
Stipulation of Facts 31a
Order Denying Rehearing 35a

TABLE OF AUTHORITIES

Page

CASES

ANDERSON V. LIBERTY LOBBY, 477 U.S. 242, 249-255(1986) 22
BEARD V. BANKS, 548 U.S. 521, 529-530 22
BLAKELY V. WASHINGTON, 542 U.S.296, 305-306(2004) 23, 24
BOARD OF REGENTS V. ROTH, 408 U.S. 564, 571 572(1972) 26
BRINKERHOFF-FARIS CO. V. HILL, 281 U.S. 673, 680(1930) 26, 27
COMMERCIALES S.A. V. ROGERS, 357 U.S. 197, 209(1958) 24
PEASE V. RATHBONE-JONES ENG. CO., 243 U.S. 273, 278 279(1917) 23
REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 150-151(2000) 22

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 ..... 7, 8
28 U.S.C. § 1332(A)(1) 3
28 U.S.C. § 2101(C) 2

RULES

FED. R. CIV. P. 56(C) ..... *passim*
SUPREME COURT RULE 13.3 2

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OPINIONS BELOW

The unpublished summary order of the Court of Appeals for the Second Circuit in *Rose Desia v. GE Life & Annuity Assurance Co. et al.*, C.A. No. 08-5641, filed October 28, 2009, affirming the district court's grant of summary judgment in favor of respondent GE Life & Annuity Assurance Co., is set forth in the Appendix hereto(App.1-5).

The unpublished memorandum of decision of the U.S. District Court for the District of Connecticut, Kravitz, J., in *Rose Desia v. GE Life & Annuity Assurance Co. et al.*, C.A. No. 3:05 CV 1395 (MRK), filed October 24, 2008, granting summary judgment in favor of respondent GE Life & Annuity Assurance Co., is set forth in the Appendix hereto(App. 6-30).

The parties' Stipulation of Facts in *Rose Desia v. GE Life & Annuity Assurance Co. et al.*, C.A. No. 3:05 CV 1395 (MRK), dated May 27, 2008, is set forth in the Appendix hereto(App. 31-34).

The unpublished Order of the Court of Appeals for the Second Circuit in *Rose Desia v. GE Life & Annuity Assurance Co. et al.*, C.A. No. 08-5641, filed January 11, 2010, denying petitioner's timely filed petition for panel rehearing, is set forth in the Appendix hereto(App. 35-36).

JURISDICTION

The decision of the Second Circuit Court of Appeals affirming the district court's grant of summary judgment in favor of respondent GE Life & Annuity

Assurance Co., was entered on October 28, 2009; and its order denying petitioner's timely filed petition for panel rehearing was filed on January 11, 2010(App. 1-5;35-36). This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioner's timely filed petition for panel rehearing. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1332(a)(1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest or costs, and is between—
> (1) citizens of different States....

Fed. R. Civ. P. 56(c) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> ....
> **(e)(2). Affidavits; Further Testimony.**
> ....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

On January 2, 1997, Barbara Bess("Bess"), a clinical psychiatrist living in New Haven, Connecticut, purchased two variable annuities from Life of Virginia(App. 32). Bess nominated her two sisters, Betsy Palozzi and Marilyn Bess Bennett, as the original beneficiaries who would share equally in these two variable annuities(*Id.*). The two annuity contracts were then transferred to respondent GE Life and Annuity Assurance Company ("respondent" or "GE") which during the course of this litigation changed ownership and then became Genworth Life and Annuity Insurance Company ("Genworth")(App. 29).

On December 18, 1998, as part of her estate plan, Bess established the "Trust u/a Barbara Bess dated December 18, 1998, f/b/o Julius Solomon"("the Barbara Bess Trust")(*Id.*). The primary beneficiary of the Barbara Bess Trust is Julius Solomon ("Solomon"), Bess' life partner of 23 years (*Id.*). As the primary beneficiary, Solomon was entitled to receive distributions from the Trust during Bess' life and to receive the entire Trust estate upon Bess' death. Bess nominated Solomon's mother (Celia Solomon) as contingent beneficiary in the event Solomon predeceased Bess.

The corpus of the Trust is composed of any property which Bess conveyed to it at the time of its creation as well as "any other property delivered to the Trustee or which otherwise comes into the Trust and becomes a part [t]hereof...." In fact, the Trust instrument anticipated that Bess would make either by will or *inter vivos* transfer additional contributions to

the Trust estate. Bess named Solomon's cousin, petitioner Rose Desia ("petitioner") as trustee who was responsible for *inter alia* managing the Trust estate so that Bess' wishes were carried out(*Id.*).

On March 27, 1999, Bess also established the "Barbara Bess Charitable Remainder Unitrust" ("the Unitrust"), naming as beneficiaries her two sisters, Betsy Palozzi and Marilyn Bess Bennett, as well as her nephew Christopher Couture(*Id.*). Both Couture and respondent A.G. Edwards & Sons, Inc.("respondent" or "A.G. Edwards"), were named co-trustees of this trust(*Id.*).

On August 15, 1999, Bess signed two change of beneficiary forms for the two annuity contracts then managed by respondent GE(App. 7;32). Specifically, Bess in writing changed the beneficiaries from her two sisters Betsy Palozzi and Marilyn Bess Bennett to "the Barbara Bess Trust"(App. 7-8). Present when Bess executed the change in beneficiary forms were petitioner, Solomon and James Stewart ("Stewart"), Bess' financial advisor from respondent A.G. Edwards (App. 7;32). After Bess signed the forms, she asked Stewart "Doesn't Rosie [Desia] have to sign these forms since she's the trustee?"(App. 9-10). Stewart answered "No" and immediately left with the two change of beneficiary forms(App. 10).

After Stewart left, Bess said to petitioner: "I don't understand why you don't have to sign these forms....You are the Trustee." It is undisputed that petitioner is the Trustee of *only one* Trust, the one created for the benefit of Solomon, the Barbara Bess Trust.

Bess died unexpectedly on August 26, 1999(App. 8-9). Immediately afterward, Stewart forwarded to respondent GE the forms changing the beneficiaries for Bess' two annuity contracts to "the Barbara Bess Trust"(App. 9;32-33). GE then sent confirmation of the change to Bess' home on August 30, 1999(App. 11;33). Four months later, however, Edward S. Saviano, Esq. ("Saviano"), Bess' attorney during her life, wrote respondent GE claiming that the change of beneficiary form naming "the Barbara Bess Trust" as beneficiary of the two annuity contracts had been completed in error and asking it to ignore Bess' change in beneficiaries which she executed on August 15, 1999, and instead recognize Bess' two sisters Betsy Palozzi and Marilyn Bess Bennett—the beneficiaries which Bess had originally named in 1997---as the rightful beneficiaries of these two annuities(App. 10;33).

GE agreed to disbursing the proceeds of the two annuities to Bess' two sisters only if the Trustee(s) of "the Barbara Bess Trust" submitted affidavits agreeing not to assert any claim to the proceeds(*Id.*). Instead of contacting petitioner in her role as Trustee of the Barbara Bess Trust, however, Saviano together with Stewart identified the Unitrust----*not* the Barbara Bess Trust for the benefit of Solomon—as the Barbara Bess Trust referred to in Bess' change of beneficiary forms (App. 10;33-34). They then secured the necessary affidavits of the two co-trustees of this different trust (Christopher Couture and Peter Aster of respondent A.G. Edwards)(App. 10;33).

Besides providing GE with these two affidavits, Saviano supplied GE with his own affidavit as Bess' attorney, Stewart's affidavit as Bess' financial planner

and the affidavit of the executor of Bess' estate(App. 10-11;33). GE disbursed the funds ($622,316.30) to Bess' two sisters after receiving these affidavits(App.11;34). Neither Saviano as Bess' attorney nor Stewart as Bess' financial planner gave notice to petitioner as Trustee of the Barbara Bess Trust for the benefit of Solomon or to Solomon himself that these events were transpiring with GE or that the funds from these two annuities were about to be disbursed to Bess' two sisters instead of to the Barbara Bess Trust for the benefit of Solomon.

At some point in 2003, Solomon and petitioner discovered GE's written notice confirming Bess' 1999 change of beneficiaries for the two annuities to the Barbara Bess Trust which GE had sent to Bess' home shortly after her death(*Id.*). Alerted for the first time that GE had confirmed in writing that the Barbara Bess Trust should have received the proceeds of these two annuities for the benefit of Solomon, petitioner as Trustee of the Barbara Bess Trust wrote GE asking why it had not disbursed the proceeds of these two annuities to the Barbara Bess Trust for Solomon's benefit(App. 11;34). GE responded by letter of July 26, 2003, informing petitioner that the annuities had been disbursed to Bess' two sisters "in accordance with the request of...Bess' attorney, Mr. Saviano"(*Id.*).

Petitioner then began this civil action against respondent GE for breach of contract in the Superior Court of Connecticut at New Haven. GE removed the action to federal district court for the District of Connecticut, positing jurisdiction under 28 U.S.C. § 1332, based upon the parties' diversity of citizenship and because the sum in controversy exceeds $75,000(*Id.*). Petitioner's core claim was that GE had

failed to disburse the proceeds of the annuities to the rightful beneficiary, the Barbara Bess Trust for the benefit of Solomon(*Id.*).

Besides denying any liability, GE counterclaimed against respondent A.G. Edwards and made Stewart, Saviano, Bess' two sisters and Couture third party defendants for the purposes of indemnification and contribution(*Id.*). The third party defendants then filed cross claims against each other(*Id.*). After some discovery among the parties, GE moved for summary judgment in its favor under Fed. R. Civ. P. 56(c), against petitioner; and some of the third party defendants also sought the same relief against GE as well as some of the other third party defendants(App. 6-7;11).

The summary judgment materials demonstrate a dramatic dichotomy in the parties' version of the crucial events in question(App. 8-10). According to Saviano, Bess' attorney, Bess actually intended to change the beneficiary of her two annuities to her Estate, *not* to either of the two trusts Bess had created(App. 8). In July of 1999, Saviano sent a letter about Bess' intention to Stewart who apparently was authorized to help Bess make these changes in the disposition of her annuities(*Id.*). Even though such a change would not have altered the ultimate beneficiaries of the annuities---the sisters were heirs to Bess' estate in any event---Saviano recommended the change for tax purposes (*Id.*).

According to Stewart, he brought blank change of beneficiary forms to Bess' home on Sunday, August 15, 1999, and *Bess then signed them in blank*(*Id.*). After

he left Bess' home, Stewart called Saviano in order to clarify what changes needed to be made even though he had already been advised in writing by Saviano about the changes; Saviano was on vacation and did not return his calls(*Id.*). When Bess suddenly died nine days later on August 26, 1999, Stewart claimed that he still had not completed the blank change of beneficiary forms which Bess had signed; he still had not submitted these forms to GE; and he still had not communicated with Saviano about what changes needed to be made even though Saviano's earlier letter to him had advised him about the change (App. 8-9).

Stewart claimed nonetheless that he could not locate Saviano's letter and "in a panic," filled in the words "Barbara Bess Trust" on the forms and sent them to GE(App. 9). Stewart further contended that when he wrote "Barbara Bess Trust" on these forms, "he believed himself to be referring to the Unitrust, which he mistakenly recalled as the entity to which...Bess wanted the beneficiary changed"(*Id.*). After he sent the forms to GE, Stewart claimed that he then found Saviano's letter, realized that he had made a mistake and that he should have changed the beneficiaries of the two annuities to the Estate of Barbara Bess and not to the Unitrust(*Id.*)

Stewart's attenuated description of his conduct describes two mistakes he allegedly made: first, he erred in not changing the beneficiary to Bess' Estate in accordance with Bess' estate plan; and second, he erred in writing "Barbara Bess Trust" on the change of beneficiary forms which (he claimed) did not clearly refer to either of Bess' trust then in existence(*Id.*).

Petitioner's proof on summary judgment described a different scenario which directly called into question the version of events put forth by both Saviano and Stewart(*Id.*). First, she submitted various documents created by some of the third party defendants which refer to "Barbara Bess Trust" as the trust Bess created for the benefit of Solomon, her partner of 23 years(*Id.*). Second, petitioner asserted that contrary to Stewart's testimony, she was present when Bess signed the forms at her home on August 15, 1999, and these forms were *not* blank when Bess executed them(*Id.*). Instead, they clearly indicated that "the Barbara Bess Trust" was to be the new beneficiary for each of the two annuities(App. 9-10).

Third, petitioner claimed that after Bess signed the forms, she asked Stewart "Doesn't Rosie [Desia] have to sign these forms since she's the trustee?"(App. 9-10). Stewart answered "No" and immediately left with the two change of beneficiary forms(App. 10). After Stewart left, Bess said to petitioner: "I don't understand why you don't have to sign these forms....You are the Trustee." It is undisputed that petitioner is the Trustee of *only one* Trust, the one created for the benefit of Solomon, the Barbara Bess Trust. Thus petitioner asserted that Bess' unmistakable intent was to make the new beneficiary for these two annuities the Barbara Bess Trust for the benefit of Solomon (*Id.*).

Fourth, petitioner adduced an array of circumstances surrounding Stewart's actions from and after August 15, 1999, which call into question the credibility of Stewart's version of events and, indeed, create a triable fact question as to whether Stewart

colluded with Saviano and Couture to defraud Solomon out of the proceeds of the annuities and that his attenuated explanation of his conduct amounted to perjury both in his deposition and affidavit. For example, according to Stewart's version, as Bess' financial advisor he allowed Bess to sign *blank* change of beneficiary forms, a practice wholly at odds with her best interests and her clear intent to make a present disposition of her annuities; he claims to have lost Saviano's written instructions about the beneficiary on these forms; he claims to have incorrectly filled out the forms when he made "the Barbara Bess Trust" the beneficiary for these two annuities; he then suddenly rediscovers Saviano's instructions, realizes his mistake, but then waits four months to correct the forms; and he embellished his affidavit before the court about the life-threatening nature of Bess' illness.

In addition, when GE agreed to disbursing the proceeds of the two annuities to Bess' two sisters only if the Trustee(s) of "the Barbara Bess Trust" submitted affidavits agreeing not to assert any claim to the proceeds, instead of contacting petitioner in her role as Trustee of the Barbara Bess Trust, however, Saviano together with Stewart identified the Unitrust---*not* the Barbara Bess Trust for the benefit of Solomon—as the Barbara Bess Trust referred to in Bess' change of beneficiary forms(App. 10;33-34). By employing this subterfuge of identifying the Unitrust instead of the Barbara Bess Trust for the benefit of Solomon as the "Barbara Bess Trust," Saviano and Stewart avoided giving petitioner as Trustee of the Barbara Bess Trust for the benefit of Solomon or Solomon himself notice that these events were transpiring with GE or that the funds from these two annuities were about to be

disbursed to Bess' two sisters instead of to the Barbara Bess Trust for Solomon's benefit.

With the summary judgment materials in this posture, the District Court, Kravitz, J., granted GE's summary judgment motion(App. 6-30). The district judge concluded that GE "has presented evidence that...Bess intended the beneficiary of the annuities to be her sisters and that [petitioner] Desia has not presented any evidence to the contrary"(App. 13).

The motion judge first ruled that there was no actual Trust with the formal name the "Barbara Bess Trust," only the so-called Solomon Trust, the trust established by Bess in 1998 for Solomon's benefit, and the Unitrust, set up by Bess in 1999(App. 8).

In granting GE's motion for summary judgment, the district judge relied on correspondence from Saviano to Stewart in July of 1999 indicating that in order to effectuate Bess' estate plan, it was important for her estate to be the beneficiary for all of her qualified retirement savings; the fact that Bess was apparently copied on this correspondence; and Stewart's testimony that on the day Bess signed the forms, she indicated an intent to change the beneficiaries in accordance with the directions of Saviano(App. 15-16). The district court thought that if the change of beneficiary forms Bess signed already provided for the beneficiary to be the "Barbara Bess Trust" when Bess signed them, "it would surely be relevant because then she might have assumed that she was changing the beneficiary to" the trust which benefitted Solomon(App. 17). However, it rejected this possibility because Stewart testified that the forms

were blank when Bess signed them and despite her assertions to the contrary, petitioner had adduced no evidence to support her claims(*Id.*).

The motion judge also considered it immaterial that Bess questioned Stewart about having petitioner sign the change in beneficiary forms as Trustee of the Barbara Bess Trust(*Id.*). He conceded that this evidence might indicate that Bess intended for the trust which benefitted Solomon be the beneficiary of her two annuities(*Id.*). However, he reasoned that "according to uncontradicted evidence [i.e., Stewart's testimony], the forms were blank" when Bess signed them(*Id.*). Thus it refused to "guess what Dr. Bess meant by this question"(*Id.*). As the district court viewed the summary judgment materials, the only clear indication of Bess' intent at the time she signed the forms is her statement to Stewart to make the changes in accordance with Saviano's instructions, an alleged statement which again depends only on the testimony---and the credibility----of Stewart himself(App. 16;18).

Even assuming that Bess asked this question of Stewart, and drawing all inferences from this fact in petitioner's favor, Judge Kravitz could not conclude "that Bess' question alone raises a legitimate disputed issue of material fact" for trial(App. 18). Nor did the fact that GE's summary judgment motion hinges entirely on the credibility of Stewart about these crucial events persuade the district judge to deny it summary judgment and provide petitioner a trial on the merits of her claims (App. 18-19). He reasoned that there was no basis in fact for petitioner's claim that Stewart had colluded with Saviano and Couture to defraud Solomon out of the proceeds of the annuities

and that by Stewart's attenuated explanation of his conduct he was perjuring himself in his deposition and affidavit(App. 18-21).

Having rejected solely on the strength of Stewart's testimony petitioner's assertions of fact that the forms Bess signed were *not* blank and that Bess had asked Stewart about petitioner also signing the forms as Trustee, two crucial facts which the district court admitted could support petitioner's claim about Bess' intent, the motion judge then proceeded to make an extended case for Stewart's credibility on these key issues of material fact since "much depends on the truthfulness of Mr. Stewart's account"(App.21-28). He characterized Stewart as an disinterested party even though he was made a third party defendant by GE; his "embellishments" in his affidavit were excusable; he had testified candidly about his many mistakes in this matter; and he was without any personal motive or incentive to defraud Solomon out of the annuities' proceeds(App. 24-28).

The district judge thus concluded:

> [T]his is an extraordinarily rare case. Mr. Stewart, who is not aligned with Genworth and has no interest in this litigation, has set forth a plausible and supported explanation of the events surrounding his meeting with Dr. Bess to obtain her signature on the blank change of beneficiary forms. [Petitioner], by contrast, not only has provided no evidence to contradict Mr. Stewart's version of those events, but also has not put forth any basis on which a reasonable jury could question Mr. Stewart's credibility.

(App. 28).

Determining that no reasonable jury could find that the Barbara Bess Trust for the benefit of Solomon is entitled to the annuities' proceeds, Judge Kravitz found that GE is not liable to petitioner for breach of contract(App. 28-29). Because the related claims against Saviano, Stewart and A.G. Edwards were dependent on a finding of liability against GE, their motions for summary judgment became moot(App. 29).

Petitioner appealed and in a summary order the court of appeals affirmed the district court's entry of summary judgment in GE's favor(App. 1-5). Like the district court, despite petitioner's contentions to the contrary, *the court of appeals assumed as a fact in this litigation---a fact based only upon Stewart's testimony and nothing else---that the forms were blank when Bess signed them on August 15, 1999*, and that Stewart later filled in the beneficiary erroneously as "the Barbara Bess Trust," one which was neither the so-called "Solomon Trust" nor the Unitrust set up be Bess(App. 3). In addition, like the district court, it concluded without any record support that the term "Barbara Bess Trust" could not mean the trust Bess established for Solomon's benefit, adopting the term "Solomon Trust" for this Trust as if Bess was required to use this precise term in order to make the Trust for the benefit of Solomon a beneficiary(App. 3).

The court of appeals further rejected as immaterial evidence that Bess asked Stewart whether petitioner should also sign the forms since she was Trustee of the "Barbara Bess Trust" which she designated as the beneficiary for her annuities(*Id.*). As

it concluded, "the jury would have to engage in impermissible speculation to infer form this single query that Bess intended her annuities be paid to...Solomon" instead of to her estate(*Id.*).

As for petitioner's challenge to the believability of the story Stewart told both in his deposition testimony and affidavit about his actions on and after August 15, 1999, the court characterized it instead as an attack on Stewart's *competence* as a financial advisor, leaving intact his distended, contradictory version of events so that it undermined the petitioner's argument that Bess actually intended that the Barbara Bess Trust for the benefit of Solomon be the beneficiary for her annuities(App. 4-5). It thus rejected this evidence as insufficient to "permit a reasonable jury to find that Bess intended to designate Julius Solomon or the Solomon trust as the beneficiary of her annuities"(App. 5).

On January 11, 2010, the court of appeals denied petitioner's timely filed petition for rehearing(App. 35-36).

REASONS FOR GRANTING THE PETITION

The Federal Courts Below Repeatedly Made Credibility Determinations Upon Summary Judgment In Order To Reject Every Genuine Issue Of Material Fact Adduced By Petitioner, The Non-Moving Party. This Practice Perverts Rule 56's Decisionmaking Process and Deprives Petitioner Of A Jury Trial On Material Fact Issues Central To Her Claims.

This is an egregious case of two federal courts usurping petitioner's right to have a jury instead of a judge determine whether Bess intended that the Barbara Bess Trust established for the benefit of Solomon, her partner of 23 years, be the beneficiary of her two annuities with GE. If a jury answers this fact question affirmatively, petitioner is entitled to the relief she sought on her complaint in the district court for breach of contract by GE when it disbursed the proceeds of these two annuity contracts to the wrong persons.

The change of beneficiary forms executed by Bess on August 15, 1999, identified the "Barbara Bess Trust" as the new beneficiary for her two annuities and this Trust was established for the benefit of Julius Solomon. Yet in the wake of Bess' death, through defalcation, subterfuge or fraud, Saviano and Stewart claimed that the change of beneficiary forms were completed in error and GE was directed to pay the proceeds of this trust instead to Bess' sisters. Both Saviano and Stewart have in their affidavits and deposition testimony confected versions of events surrounding Bess' execution of the change of

beneficiary forms to explain away their efforts to sabotage Bess' intent and give the proceeds to Bess' sisters instead of to Solomon. Their versions of the relevant events—especially Stewart's---are so attenuated and contradictory as to seriously call into question their credibility in causing the proceeds to be diverted to Bess' sisters and away from Solomon.

Yet upon GE's summary judgment motion the district court and, more important, the court of appeals, practically vouched for the credibility of Stewart, determined that he was telling the truth about the crucial events in question and determined that petitioner's proof to the contrary did not create genuine issues of material fact for trial. Both courts, then, relying solely on the credibility of Stewart, thereby concluded as a matter of fact that Bess intended to make her sisters the beneficiaries of the annuities instead of the Trust set up for the benefit of Solomon.

The genuine issues of material fact which the courts below resolved solely on the basis of Stewart's credibility were crucial to a fair disposition of this litigation and were proper grist for the jury's mill. First, both courts assumed that the change of beneficiary forms were blank when Bess signed them, as Stewart testified. Yet petitioner asserted, contrary to Stewart's testimony, that she was present when Bess signed the forms at her home on August 15, 1999, and *these forms were not blank* when Bess executed them, clearly indicating that "the Barbara Bess Trust" was to be the new beneficiary for each of the two annuities(App. 9-10). Both the district court and the court of appeals adopted Stewart's testimony in their

decisions and concluded as a matter of fact that the forms were, in fact, blank when Bess signed them.

Indeed, the district court thought that if the change of beneficiary forms Bess signed were not blank, "it would surely be relevant because then she might have assumed that she was changing the beneficiary to" the trust which benefitted Solomon(App. 17). However, it rejected this possibility *because Stewart had testified that the forms were blank when Bess signed them*, despite the assertion of petitioner----who was present at the signing---that the forms were not blank(*Id.*). This was a disputed question of material fact for the jury and the courts below were wrong to decide it for themselves.

Second, the courts below rejected as immaterial Bess' question to Stewart about having petitioner sign the change in beneficiary forms as Trustee of the Barbara Bess Trust. While the district court thought that this evidence might be an indicator that Bess intended for the Trust which benefitted Solomon to be the beneficiary of the two annuities, he also concluded that "according to uncontradicted evidence [i.e., *Stewart's testimony*], the forms were blank" when Bess signed them and the "Court cannot guess what Dr. Bess meant by this question"(*Id.*). Yet Bess' question was probative of her intent *if the forms were not blank* because it is undisputed that petitioner is the Trustee of *only one* Trust, the one created for the benefit of Solomon, the Barbara Bess Trust.

Once again, however, both courts below adopted as credible Stewart's testimony that the forms were, in fact, blank when Bess signed them and therefore

concluded that Bess' question had no probative worth, disposing of yet another crucial disputed question of material fact which a jury should have been allowed to decide.

Third, both courts believed that the only clear indication of Bess' intent at the time she signed the forms is her statement to Stewart to make the changes in accordance with Saviano's instructions. However, this alleged statement by Bess *once more depends on the testimony---and the credibility---of Stewart* who is the only person who testified to this alleged directive by Bess(App. 16;18).

Finally, in response to petitioner adducing the many factual inconsistencies surrounding the improbable explanation of Stewart about his conduct on and after August 15, 1999, the district court, in a remarkable rehabilitation of Stewart's testimony in order to bolster his credibility, characterized Stewart as an disinterested party even though he was made a third party defendant by GE; called his "embellishments" in his affidavit excusable; decided that he had testified candidly about his many mistakes in this matter; and found that he was without any personal motive or incentive to defraud Solomon out of the annuities' proceeds(App. 24-28). Moreover, the court of appeals construed this challenge to Stewart's veracity by petitioner as merely an attack on his *competence*, minimizing the broad theme of petitioner's proof which call into question the credibility of Stewart's version of events and create a triable fact question whether Stewart colluded with Saviano and Couture to defraud Solomon out of the proceeds of the annuities and that his attenuated, contradictory

explanation of his conduct amounted to perjury both in his deposition and affidavit(App. 5).

Yet assessing the worth of Stewart's testimony and affidavit as a percipient witness to the crucial events in this case was for a jury, not a judge, and both courts below ran afoul of the basic principles of summary judgment jurisprudence developed by this Court in sanitizing his conduct, adopting wholesale his version of events and disposing of this case in GE's favor. This perversion of the summary judgment process failed to give the materials adduced by petitioner, the non-moving party, the deference they deserved; failed to read all of the summary judgment materials, including the affidavits of Saviano and Stewart, *against* GE as the moving party; and made crucial credibility determinations which a jury—not judges—should make under the Rule 56 process as set out by the decisions of this Court. These serial failures of the Rule 56 protocol led to egregious factfinding by both courts below and prevented petitioner from having her day in court on the merits of her claims.

This Court has enunciated two core principles attendant to the resolution of a motion for summary judgment under Rule 56. First, in construing the materials adduced by the parties incident to respondent's summary judgment motion, both the district judge and the court of appeals were bound to draw all reasonable inferences from these materials *against* respondent as the moving parties and *in favor* of petitioner as the non-moving party. Second, they were further required to resolve all credibility questions *in favor* of petitioner, the non-moving party, because the role of the courts is only to determine

whether there is a genuine issue of material fact for trial and only a trial judge or a jury may properly determine who is credible. *Beard v. Banks*, 548 U.S. 521, 529-530; 534(2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986). Both courts below failed to adhere to these two fundamental principles.

Even on its *de novo* review of this summary judgment ruling, the court of appeals was not free to credit one story rather than another about the way Bess executed the change of beneficiary forms, whether they were blank or not or whether Stewart's explanations about his conduct rang true. By choosing to believe Stewart's version of events to the exclusion of petitioner's opposing version of the facts, the court of appeals distorted Rule 56's decisionmaking procedure, made repeated credibility determinations to the detriment of petitioner and deprived her of a jury trial on material fact issues central to her claim.

This distortion of the Rule 56 procedure invokes the Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions. The Court should use this opportunity to reaffirm and restate the holdings of *Beard, Reeves* and *Anderson* which require courts to draw all reasonable inferences in favor of the party opposing the motion for summary judgment and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555 (Ginsburg, J., dissenting).

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure contained in Rule 56 does not violate a party's constitutional right to a jury trial. It is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917). However, when the federal courts embark on an extended assessment of the credibility of the evidence adduced by the parties incident to summary judgment, indeed rehabilitating the testimony of percipient witnesses of the moving party in order to bolster their credibility and thereby to reject every genuine issue of material fact adduced by the non-moving party, the summary judgment process has been perverted and the non-movant's right to a jury trial has been violated.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As the Court observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed.1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by

adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

The several courts of appeals, however, repeatedly overlook the fact that jury trials are the best way under our Federal constitution to resolve genuine issues of material fact in civil actions, deciding fact questions for themselves and making credibility judgments on the papers before them. Both federal jurists and legal commentators have noted that federal courts regularly abuse summary judgment procedure in order to take triable cases away from juries. See Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts,

even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This abuse of summary judgment procedure has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, courts often reject a plaintiff's attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue of material fact, by treating the plaintiff's evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiff's proof rather than considering its cumulative effect. *Id.* at 233-236.

Such is the case here. The summary judgment procedure employed by both federal courts below denied petitioner her right to a jury trial in the district court on the triable fact questions of whether Bess intended that the Barbara Bess Trust established for the benefit of Solomon, her partner of 23 years, be the beneficiary of her two annuities with GE; whether the change of beneficiary forms were blank when she signed them; whether she asked Stewart if petitioner shouldn't also sign them since she was the Trustee of the Barbara Bess Trust for the benefit of Solomon; whether Stewart colluded with Saviano and Couture to defraud Solomon out of the proceeds of the annuities;

whether Stewart's attenuated explanation of his conduct amounted to perjury both in his deposition and affidavit; and whether Stewart was a believable witness at all. A jury should be allowed to decide these core questions of material fact and the court of appeals' repudiation of the principles enunciated by this Court in *Beard*, *Reeves* and *Anderson* denied petitioner a jury trial on the merits of her claims.

Finally, the federal courts' unfair, unprincipled treatment below of the parties' summary judgment materials, deciding credibility questions for themselves in order to reject every genuine issue of material fact adduced by petitioner and thereby deny her a hearing on the merits of her claim for breach of contract, denied her due process of law. Petitioner's cause of action and her right to have her claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). The federal guaranty of due process, including the right to a jury trial under the Seventh Amendment, extends to the judicial branch of government and the way it decides a litigant's claims. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680(1930).

With any matter before it, the Court's concern is solely with the question whether petitioner as a federal litigant has been accorded due process in the primary sense, i.e., whether she

> had an opportunity to present [her] case and be heard in [her] support....Whether acting through its judiciary or through its legislature, a [government] may not deprive a person of all existing remedies for the enforcement of a

> right...unless there is, or was, afforded to [her] some real opportunity to protect it.

Id. at 681-682(Brandeis, J.)(footnotes omitted). The lower courts' extended defense of Stewart's credibility, bolstering his evidence at every turn to the detriment of petitioner as the non-moving party, extinguishing every genuine issue of material fact adduced by petitioner in the process, denied her due process of law.

CONCLUSION

For all the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remand the matter to the district court for further discovery and a trial on the merits of petitioner's claims; or to provide her with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Costantino Fragale
575 White Plains Road
Eastchester, NY 10709
(914)337-4001

Dennis P. Derrick
Counsel of Record
7 Winthrop Street
Essex, MA 01929-1203
(978)768-6610
dennisderrick@comcast.net

(any footnotes trail end of each document)

No. 08-5641-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSE DESIA, Trustee Barbara Bess Trust, f/b/o Julius Solomon,
Plaintiff-Appellant,

v.

GE LIFE & ANNUITY ASSURANCE CO.,
Defendant-Third-Party-Plaintiff-Appellee,

A.G. EDWARDS & SONS, INC.,
Defendant-Third-Party-Defendant,

BETSY L. PALOZZI,
Cross-Defendant-Third-Party-Defendant,

MARILYN BESS BENNETT, CHRISTOPHER COUTURE, ESTATE OF BARBARA BESS, GELAAC, EDWARD S. SAVIANO, JAMES B. STEWART, Third-Party-Defendants.

October 28, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: APPEARING FOR APPELLANT: CONSTANTINO FRAGALE, Eastchester, New York.

APPEARING FOR APPELLEE: ANDREW W. SIDMAN (David G. Smitham, on the brief), Bressler, Amery & Ross P.C., New York, New York.

PRESENT: REENA RAGGI, DEBRA ANN LIVINGSTON, Circuit Judges, BRIAN M. COGAN, District Judge.*

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on October 27, 2008, is AFFIRMED.

Plaintiff Rose Desia, trustee of the Barbara Bess Trust f/b/o Julius Solomon (the "Solomon trust"), appeals from an award of summary judgment in favor of defendant GE Life & Annuity Assurance Co. ("GE") on Desia's claim that GE breached contracts with Bess when, upon Bess's death, it paid the proceeds of two annuities to Bess's sisters rather than to a trust intended to benefit Bess's longtime companion, Julius Solomon. We review an award of summary judgment *de novo*, and we will affirm only if the record, viewed in the light most favorable to the nonmoving party, reveals no genuine issue of material fact. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Ollman v. Special Bd. of Adjustment No. 1063*, 527 F.3d 239, 245 (2d Cir. 2008). We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. *Bess's Intent*

Plaintiff submits that the district court erred in determining that she had failed to adduce sufficient evidence to raise a material question of fact regarding Bess's intent to have defendants pay the proceeds of her annuities to the Solomon trust rather than to her sisters, the original beneficiaries named in the policy. *See, e.g., Bigley v. Pac. Standard Life Ins. Co.*, 229 Conn. 459, 462, 642 A.2d 4 (1994) (holding insurer discharged from liability if, in good faith, it pays beneficiary designated by policyholder). We disagree. The district court carefully and accurately detailed the evidence of two change-of-beneficiary forms that Bess signed in blank before her death, but that her financial adviser, James Stewart, filled out and submitted to defendant only after Bess's death. The submitted forms indicated that the annuities' beneficiary was to be the "Barbara Bess Trust" rather than Bess's sisters. But, as the district court observed, no such trust exists. The only trusts relevant to this action are the Solomon trust and the Barbara Bess Charitable Remainder Unitrust, of which Bess's sisters were the beneficiaries. The only evidence plaintiff proffered to support her claim that Bess intended to make the Solomon trust the beneficiary of her annuities was Desia's own testimony that Bess asked whether Desia, as trustee of the Solomon trust, was required to sign the change of beneficiary form. Desia Dep. at 119:16. This statement raises no triable fact issue because a jury would have to engage in impermissible speculation to infer from this single query that Bess intended her annuities to be paid to Julius Solomon. *See Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 502 (2d Cir. 2001). Desia acknowledged that Bess never said anything to her

indicating an intent to have the proceeds of her annuities paid to Solomon. Further, the record is replete with uncontradicted evidence that Bess completed the change of beneficiary form in accordance with her estate plan, which named her estate as the beneficiary of all her qualified annuities. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). Accordingly, like the district court, we conclude that Desia failed to adduce evidence sufficient to defeat summary judgment.

2. *Stewart's Credibility*

Desia also argues that material questions of fact as to the credibility of Bess's financial adviser, James Stewart, precluded summary judgment. We are not persuaded. Although witness credibility is usually a question of fact for the jury, *see, e.g.*, *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007), "[b]road, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact" for trial, *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005). A plaintiff opposing summary judgment must still "identify affirmative evidence from which a jury could find that the plaintiff has carried . . . her burden of proving the pertinent [intent]." *Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); *see also McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999) (observing that party "cannot defeat summary judgment . . . merely by impugning [a witness's] honesty").

Desia attacks Stewart's credibility based on the witness's acknowledgment that, in a 2000 affidavit, he had "embellished" his recollection about the life-

threatening nature of Bess's illness. *See* Stewart Dep. at 33. Desia also identifies evidence impugning Stewart's competence as a financial adviser, *e.g.*, evidence that Stewart (1) had Bess sign a blank form, (2) did not recollect Bess's lawyer's written instructions, (3) misunderstood who should be the new beneficiary, and (4) did not attempt to correct the form for four months after realizing the forms had been incorrectly filled out. This general attack on Stewart's competence, even if credited, provides no evidence that would permit a reasonable jury to find that Bess intended to designate Julius Solomon or the Solomon trust as the beneficiary of her annuities. Accordingly, we uphold the award of summary judgment in favor of defendants.

We have considered plaintiff's other arguments on appeal and conclude that they lack merit. Accordingly, we AFFIRM the judgment of the district court.

Footnotes

* District Judge Brian M. Cogan of the United States District Court for the Eastern District of New York, sitting by designation.

NO. 3:05 CV 1395 (MRK)
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ROSE DESIA, Trustee Barbara Bess Trust, F/b/o
Julius Solomon,
Plaintiff,

v.

GE LIFE & ANNUITY ASSURANCE CO.,
Defendant and Third-Party Plaintiff,

v.

CHRISTOPHER COUTURE, individually, and in his capacity as Executor of the Estate of Barbara Bess, EDWARD S. SAVIANO, JAMES STEWART, A.G. EDWARDS & SONS, INC., MARILYN BESS BENNETT, BETSY L. PALOZZI, and THE ESTATE OF BARBARA BESS,
Third-party Defendants.

October 24, 2008, Decided
October 24, 2008, Filed

MEMORANDUM OF DECISION

Pending before the Court is Defendant Genworth's Motion for Summary Judgment [doc. # 185] against Plaintiff Rose Desia, third-party Defendant Saviano's Motion for Summary Judgment [doc. # 183] against third-party Plaintiff Genworth, and third-party Defendants A.G. Edwards and James Stewart's Motion for Summary Judgment against third-party Defendant

Saviano [doc. # 195]. For the following reasons, Genworth's Motion for Summary Judgment [doc. # 185] is GRANTED, Defendant Saviano's Motion for Summary Judgment [doc. # 183] and Defendants A.G. Edwards and James Stewart's Motion for Summary Judgment [doc. # 195] are DENIED as moot.

I.

This case revolves around two annuities owned by the late Dr. Barbara Bess, a physician living in New Haven, Connecticut who died in August 1999. Plaintiff Rose Desia brings suit as the trustee of the Trust u/a Barbara Bess Dated December , 1998 f/b/o Julius Solomon (the "Solomon Trust") against the Genworth Life and Annuity Insurance Company ("Genworth"), [1] the company that issued the annuities. The Solomon Trust was created for the benefit of Julius Solomon, who was the longtime companion of Dr. Bess and is Ms. Desia's first cousin. Ms. Desia's basic claim is that Genworth breached the annuity contracts by paying the proceeds of the two annuities to Marilyn Bess Bennett and Betsy Palozzi, Dr. Bess's sisters, rather than to the Solomon Trust, which Ms. Desia claims is the rightful beneficiary of the annuities.

Events leading to Dr. Bess's death and the months that followed her death form the focus of this litigation. It is undisputed that on August 15, 1999, Dr. Bess signed two change of beneficiary forms for the Genworth annuities. Although Dr. Bess signed the forms shortly before her death, James Stewart, her financial advisor at A.G. Edwards, did not submit the forms to Genworth until after she had died. The change of beneficiary forms state that the beneficiary of the annuities should be changed from Dr. Bess's sisters, who were the

previous beneficiaries of the annuities, to the "Barbara Bess Trust." As requested, Genworth sent confirmation to Dr. Bess's home that it had changed the beneficiary of the two annuities to the "Barbara Bess Trust." [2]

However, neither of the two trusts created in Barbara Bess's name is formally called the "Barbara Bess Trust." In other words, no trust by the formal name of the "Barbara Bess Trust" exists. One of the trusts that does exist is the Solomon Trust, whose trustee is the Plaintiff in this action. The other trust that existed at the time of Dr. Bess's death was called the Barbara Bess Charitable Remainder Unitrust (the "Unitrust"), which had as its beneficiaries Dr. Bess's sisters.

According to Mr. Stewart and Mr. Saviano, who was both Dr. Bess's estate attorney and the attorney for her Estate, Dr. Bess actually intended to change the beneficiary of the annuities to the Estate of Barbara Bess and not to *either* of the trusts. In July 1999, Mr. Saviano sent a letter to this effect to Mr. Stewart, who was authorized to assist Dr. Bess in making the necessary changes. The change would not have altered the ultimate beneficiary of the annuities -- the sisters were the heirs to Dr. Bess's Estate -- but Mr. Saviano had recommended the change for tax purposes. According to Mr. Stewart, he brought blank change of beneficiary forms to Dr. Bess's home on Sunday, August 15, 1999 and she signed them in blank. After his August 15 meeting with Dr. Bess, Mr. Stewart called Mr. Saviano's office to clarify what changes needed to be made but Mr. Saviano was on vacation and did not return his calls.

Unfortunately, Dr. Bess's health took a sudden turn for the worse and she died on August 26, 1999. Upon

receiving the news of her death, Mr. Stewart realized that he had not yet filled out and submitted the change of beneficiary forms. He could not locate Mr. Saviano's letter and had still not heard back from Mr. Saviano. In a panic, Mr. Stewart filled in the words "Barbara Bess Trust" and sent the forms to Genworth. Mr. Stewart contends that when he wrote "Barbara Bess Trust" on the forms, he believed himself to be referring to the Unitrust, which he mistakenly recalled as the entity to which Dr. Bess wanted the beneficiary changed. After he sent the change of beneficiary forms to Genworth, however, he found Mr. Saviano's letter and realized that he had made a mistake and that he should have changed the beneficiary of the Genworth annuities to the Estate of Barbara Bess and not to the Unitrust. In essence, then, Mr. Stewart claims that he made two errors: first, he erred in not changing the beneficiary to the Estate of Barbara Bess in accordance with Dr. Bess's estate plan and, second, he erred in writing "Barbara Bess Trust" on the change of beneficiary forms, which does not clearly refer to either of Dr. Bess's trusts then in existence.

Ms. Desia tells a different version of events. In her version, Barbara Bess Trust refers to the Solomon Trust. [3] She has submitted various documents created by the third-party defendants that refer to the Solomon Trust as the Barbara Bess Trust f/b/o Julius Solomon, and from that acknowledged fact, she argues that the Solomon Trust is the Barbara Bess Trust. She also alleges that, contrary to the testimony of Mr. Stewart, the forms were not blank when Dr. Bess signed them and that the forms said "Barbara Bess Trust" at that time. Ms. Desia claims that she was present when Dr. Bess signed the forms (although this is disputed by Mr.

Stewart) and that after Dr. Bess signed the forms, she asked Mr. Stewart, "Doesn't Rosie have to sign these forms since she's the trustee?" to which Mr. Stewart answered "No." See Def.'s Mot. for Summ. J. [doc. # 185], Ex. 15 at 106. In her view, Dr. Bess's question illustrated an intent on behalf of the deceased to change the beneficiary of the annuities to the Solomon Trust, of which she was a trustee. Neither Ms. Desia nor Mr. Solomon had any other conversations with Barbara Bess concerning the annuities before her death. *See* Reply to Resp. to Pl.'s Cross Mot. for Summ. J. [doc. # 247] at 11-12.

What happened after Mr. Stewart discovered the mistake is, for the most part, undisputed. Mr. Stewart contacted Mr. Saviano and told him of his errors. On January 18, 2000, Mr. Saviano sent a letter to Genworth, along with an affidavit from Mr. Stewart, stating that the change of beneficiary forms had been completed in error and asking them to recognize Marilyn Bess Bennett and Betsy Palozzi -- the previous beneficiaries of the annuities as well as the beneficiaries of Dr. Bess's Estate -- as the rightful beneficiaries of the annuities. Genworth agreed to disburse the proceeds of the annuities to the sisters if the trustees of the Barbara Bess Trust submitted affidavits agreeing not to assert a claim to the proceeds. Mr. Saviano and Mr. Stewart identified the Unitrust as the Barbara Bess Trust and submitted affidavits from the Unitrust's trustees, Chris Couture, Dr. Bess's nephew and executor of her Estate, and Peter Oster of A.G. Edwards. [4] All in all, Genworth received affidavits from the executor of Dr. Bess's Estate, Dr. Bess's financial planner, the attorney for both Dr. Bess and the Estate, and from both trustees of the trust Genworth believed

to be the Barbara Bess Trust. Upon receiving these affidavits, Genworth disbursed the proceeds to Dr. Bess's sisters.

At some point in 2003, Mr. Solomon came across the confirmation letters Genworth had sent to Dr. Bess in August 1999 stating that the beneficiary on her policies had been changed to the Barbara Bess Trust. After speaking with Ms. Desia, they became convinced that the Solomon Trust should have received the proceeds. Ms. Desia wrote a letter to Genworth asking why the annuities had not been disbursed to the Solomon Trust. Genworth responded by letter on June 26, 2003, stating that the annuities had been disbursed to Marilyn Bess Bennett and Betsy Palozzi in accordance with the request of Dr. Bess's attorney, Mr. Saviano.

Ms. Desia then sued Genworth and A.G. Edwards for breach of contract, [5] on the grounds that Genworth had failed to disburse the proceeds of the annuities to the rightful beneficiary, which in her view was the Solomon Trust. [6] Genworth filed counterclaims against A.G. Edwards and James Stewart, Edward Saviano, Betsey Palozzi, Marilyn Bess Bennett, and Chris Couture for indemnification and contribution. Mr. Saviano filed cross claims against A.G. Edwards and James Stewart. In turn, A.G. Edwards, James Stewart, and Chris Couture filed cross claims against Marilyn Bess Bennett and Betsy Palozzi. [7] Not all of these third-party defendants have filed for summary judgment and as such, the Court does not consider the claims against them.

II.

As this Court has stated on many previous occasions, summary judgment is appropriate only when "the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The moving party bears the burden of demonstrating that no genuine issue exists as to any material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and the Court must resolve all ambiguities and draw all inferences in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255; *Holcomb v. Iona College*, 521 F.3d 130, 137 (2d Cir. 2008). If the moving party carries its burden, the party opposing summary judgment "may not rely merely on allegations or denials." Fed. R. Civ. P. 56(e)(2). Rather, the opposing party must "set out specific facts showing a genuine issue for trial." *Id.* In short, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "If the evidence is merely colorable, or is not

significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III.

Genworth argues that it is entitled to summary judgment for three reasons. First, it contends that it complied with the insurance contract and therefore, it cannot be held liable even if it inadvertently paid the proceeds of the annuities to the wrong beneficiary. Second, Genworth asserts that even if it did not comply with the insurance contract, Genworth conducted a reasonably prudent investigation into potentially competing claims and that is all that is required under Connecticut law. Third, Genworth argues that even if Connecticut has adopted a strict liability standard for the payment of annuities, Genworth did in fact pay the rightful beneficiary of the annuities in question -- Dr. Bess's sisters.

The Court need not reach the first two grounds -- and indeed does not reach them -- because it finds for Genworth on the third. Taking all of the evidence in the record in the light most favorable to the Plaintiff, the Court concludes the Genworth has presented evidence that Dr. Bess intended the beneficiary of the annuities to be her sisters and that Ms. Desia has not presented any evidence to the contrary. Therefore, Genworth is entitled to summary judgment.

A.

The parties spend a lot of time in their briefs arguing about the meaning of *Bigley v. Pacific Standard Life Insurance Company*, 229 Conn. 459, 642 A.2d 4 (1994), which all parties agree is controlling. In Bigley, an insurance company paid the proceeds of an insurance

policy to a beneficiary that had been named by the policyholder shortly before her death. After the policy had been paid, it was discovered that the change of beneficiary form was fraudulent and that the policyholder had not intended to change the beneficiary. The actual beneficiary of the policy then brought suit for breach of contract. The Connecticut Supreme Court held that the insurance company was not discharged from liability even though it had paid the proceeds of the policy in good faith, because it had not paid the proceeds to the beneficiary actually designated by the policyholder. Ms. Desia argues that *Bigley* adopts a strict liability standard for the payment of annuities. Genworth, on the other hand, argues that *Bigley* merely confirms that an insurance company must comply with the terms of the insurance contract and that nothing in *Bigley* abrogates the general rule that an insurance company must only conduct a reasonably prudent investigation into any competing claims.

One point on which everyone agrees, however, is that *Bigley* stands for the proposition that it is the intent of the policyholder that governs the question of who is the rightful beneficiary. *See id.* at 463 ("Payment of the policy proceeds to a person fraudulently substituted as beneficiary, however, does not relieve the insurer of its contractual obligation to pay the beneficiary *actually designated by the policyholder*." (emphasis added)); *id.* at 464 ("[A]n insurer will be discharged from liability only when it pays the proceeds in good faith to the beneficiary *actually designated by the policyholder*." (emphasis in original)). *Bigley* is equally clear that Genworth is absolved from liability if it did in fact pay the rightful beneficiary, although Genworth has the

burden of proof on this point. *Id.* at 463. The relevant question, then, is whether Genworth has met its burden to show that it paid the beneficiary intended by Dr. Bess, which Genworth claims was Dr. Bess's sisters, and whether Ms. Desia has presented any contrary evidence that would create a disputed issue of material fact.

B.

Genworth presented the following facts to support its claim that Dr. Bess's sisters were the rightful beneficiaries of the annuities in question. At his deposition, Mr. Saviano testified that he met with Dr. Bess to discuss her estate plan and that they agreed to change the beneficiaries on some of her insurance policies to her Estate for tax purposes. He also testified that Dr. Bess requested that he let Mr. Stewart know "what to do on her death beneficiary designations." Aff. re Def.'s Mot. for Summ. J. [doc. # 238], Ex. 25 at 30. Genworth submitted a letter that Mr. Saviano sent to Mr. Stewart on July 28, 1999, which confirms that the beneficiary of the annuities was to be changed to the Estate of Barbara Bess. *See* Def.'s Mot. for Summ. J. [doc. # 185], Ex. 9 ("In order to effectuate her estate plan, it is important that the death beneficiary of all her qualified retirement savings are her estate."). Dr. Bess was cc'd on this letter and no one has presented any evidence to suggest that she did not receive a copy of it. Mr. Stewart testified that during the meeting in which Dr. Bess signed the change of beneficiary forms, she told him to "make sure you talk to Ed to find out, you know, where the -- where the -- where these annuities -- which annuities and who are the beneficiaries to be changed to." Supp. Aff. re Def.'s Mot. for Summ. J. [doc. # 249], Ex. 20 at 80. Unfortunately for everyone

involved, Mr. Stewart did not check with Mr. Saviano prior to filling out the change of beneficiary forms. That does not change the fact, however, that Mr. Stewart testified that on the day Dr. Bess signed the forms, she indicated an intent to change the beneficiaries in accordance with the directions of Mr. Saviano, who had instructed Mr. Stewart by letter to change the beneficiary to her Estate.

Ms. Desia admits that she "never had any conversation with Barbara E. Bess wherein Ms. Bess advised Ms. Desia that the [Solomon Trust] was the beneficiary of the Annuities," that she "did not know that Ms. Bess was planning to change the beneficiaries of the annuities nor did she discuss the annuities in front of the Third-Party Defendant James Stewart on August 15, 1999," that she "did not see Barbara Bess or anyone else write 'Barbara Bess Trust' on the [change of beneficiary] forms," and that "after August 15, 1999, there was no further discussion concerning the annuities between Plaintiff and Barbara Bess or between Julius Solomon and Barbara Bess." Reply to Resp. to Pl.'s Cross Mot. for Summ. J. [doc. # 247] at 11-12.

Despite this seeming lack of knowledge of Dr. Bess's intent, Ms. Desia still maintains that she knows that Dr. Bess intended to make the Solomon Trust the beneficiary of the Genworth annuities. To support her supposition, Ms. Desia points to documents that she says show that the Solomon Trust was known as the Barbara Bess Trust. [8] Presumably, Ms. Desia believes these documents are relevant for discerning what the person who filled out the forms meant when they wrote "Barbara Bess Trust." But if it was Mr. Stewart who wrote "Barbara Bess Trust" on the change of

beneficiary forms -- a fact no one disputes -- "Barbara Bess Trust" is irrelevant. As the Court explained above, it is Dr. Bess's intent, not Mr. Stewart's, that controls.

Granted, if the forms said "Barbara Bess Trust" when Dr. Bess signed them that would surely be relevant because then she might have assumed that she was changing the beneficiary to the Solomon Trust. But Mr. Stewart testified that the forms were blank when Dr. Bess signed them. See Supp. Aff. Re Def.'s Mot. For Summ. J. [doc. # 249], Ex. 20 at 55-56. Although Ms. Desia's counsel at oral argument alleged that the forms were actually filled in when Dr. Bess signed them, Ms. Desia has presented no evidence to that effect. Mr. Solomon testified that he did not see what was written on the forms. *See* Def.'s Mot. for Summ. J. [doc. # 185], Ex. 16 at 372-73. Ms. Desia testified that she did not see Dr. Bess write anything on the forms besides her signature. *See id.* Ex. 15 at 122.

Ms. Desia also rests on the fact that Dr. Bess asked Mr. Stewart "Doesn't Rosie have to sign these forms since she's the trustee?" to which Mr. Stewart answered "No." *Id.* Ex. 15 at 106. Again, this might be an indicator of Dr. Bess's intent if the forms had said "Barbara Bess Trust" when Dr. Bess signed them. But according to uncontradicted evidence, the forms were blank. The Court cannot guess what Dr. Bess meant by this question. For instance, Dr. Bess may have been confused. But that is not inconsistent with her statement to Mr. Stewart that he should fill out the forms according to Mr. Saviano's instructions. And according to the letter sent by Mr. Saviano, his instructions were to change the beneficiary to Dr. Bess's estate. Simply put, the only clear indication we

have of Dr. Bess's intent at the time she signed the forms is her statement to Mr. Stewart to make the changes in accordance with Mr. Saviano's instructions. Even assuming, as we must, that Dr. Bess did ask Ms. Desia whether she needed to sign, and even drawing all inferences in Ms. Desia's favor, the Court simply cannot conclude that Dr. Bess's question alone raises a legitimate disputed issue of material fact.

C.

If Ms. Desia's only argument against summary judgment was that material facts were in dispute, then the Court's inquiry could end here. However, Ms. Desia also argues that the Court should deny summary judgment because Mr. Stewart's credibility is at issue. In her view, Mr. Stewart is colluding with Mr. Saviano and Mr. Couture to defraud Mr. Solomon out of the proceeds of the annuities and that he is perjuring himself in his deposition and in his affidavit. Genworth's argument for summary judgment admittedly hinges on the testimony of Mr. Stewart. Therefore, the Court must determine whether Ms. Desia's argument concerning Mr. Stewart's credibility warrants denying summary judgment in this case, despite the fact that Ms. Desia has not raised a disputed issue of material fact.

Of course, the well-established rule is that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *see also Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007) ("Resolutions of credibility conflicts and choices between conflicting versions of the

facts are matters for the jury, not for the court on summary judgment."). On a motion for summary judgment, district courts simply "*may not* make credibility determinations . . . ." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 118 (2d Cir. 2006) (emphasis added). Even in borderline cases, where the nonmovant has provided only a modicum of evidence to suggest that credibility is an issue, a court should err on the side of sending credibility determinations to the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)("[T]he trial courts should act . . . with caution in granting summary judgment . . . where there is reason to believe that the better course would be to proceed to a full trial."). Otherwise, the court is weighing the evidence, which it decidedly cannot do on a motion for summary judgment.

However, "if the [moving party] has made a properly supported motion [for summary judgment], the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden." *Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (2007); *see also Anderson*, 477 U.S. at 256 (holding that a plaintiff may not defeat "a defendant's properly supported motion for summary judgment" if he or she does not offer "any concrete evidence from which a reasonable juror could return a verdict in his favor" but merely asserts that "the jury might, and legally could, disbelieve the defendant[]"). In other words, "[the nonmovant] cannot defeat the motion [for summary judgment] by relying . . . on mere assertions that affidavits supporting the motion are not credible."

Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996); *see also McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999) ("[G]eneral attacks upon the defendant's credibility are not sufficient to defeat properly supported summary judgment motion."). Rather, summary judgment is appropriate "where, notwithstanding issues of credibility, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor. In this situation, it may be said that the record as a whole points in one direction and the dispute is not 'genuine.'" *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120 (3d Cir. 1998) (citations omitted).

Thus, as one of the leading treatises on procedure advises, "the general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment. Unsupported allegations that credibility is in issue will not suffice." 10A Wright et al., Federal Practice and Procedure § 2726, at 445 (1998); *see also Corrugated Paper Products, Inc. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989) (A nonmovant cannot merely "recite the incantation 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof."); *United States v. Real Property*, 480 F.3d 841, 844 (8th Cir. 2007) (A nonmovant cannot "simply rest on the hope of discrediting the movant's evidence at trial."); *U.S. Bancorp Oliver-Allen Tech. Leasing v. Hall*, No. 04 Civ. 4986, 2005 U.S. Dist. LEXIS 16231, 2005 WL 1875459, at *4 (S.D.N.Y. 2005) ("[A] party [opposing summary judgment] may not rest upon unsupported allegations or denials, or simply claim without support that evidence adduced by the movant in support of the

motion is not credible. Indeed, the very purpose of summary judgment - preserving resources for the adjudication of actual disputes -- would be defeated if the non-movant, failing to meet its burden at the summary judgment stage, were given yet another opportunity to uncover and present facts at trial." (citations and quotation marks omitted)); *Fernandez v. China Ocean Shipping Co.*, 312 F. Supp. 2d 369, 378 (E.D.N.Y. 2003) ("Although witness credibility is usually a question for the jury, Fernandez has not produced any evidence to impugn Shen's credibility despite his ability to do so at the deposition. Merely '[t]o assert that [a] witness[] may be lying, without any evidence to contradict the witness' testimony cannot defeat a motion for summary judgment."); *Marks v. Nat'l Comm. Assoc., Inc.*, 72 F. Supp. 2d 322, 333 (S.D.N.Y. 1999) ("[T]he nonmovant cannot survive summary judgment simply by asserting that a potential witness's credibility is at issue. Rather, to 'put credibility in issue so as to preclude summary judgment,' the nonmovant must produce 'specific facts' that demonstrate an actual inconsistency."); *County of Orange v. Sullivan*, 752 F. Supp. 643, 647 (S.D.N.Y. 1990) ("If credibility of the movant's witness is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied. There must, however, be more than mere allegations in a memorandum of law to place credibility in issue and preclude summary judgment.").

In support of her contention that Mr. Stewart's credibility is in question, Ms. Desia submits the following. First, she points out that it is odd that Mr. Stewart and Mr. Saviano waited over four months to contact Genworth after they allegedly discovered the

error on the change of beneficiary forms. She believes the Court should draw an inference in her favor that this indicates some nefarious purpose on the part of Mr. Stewart. Second, she alleges that Mr. Stewart forged Dr. Bess's signature on other change of beneficiary forms not at issue in this case, although it appears to the Court that Ms. Desia's only evidence of such a forgery is that she could not uncover any evidence that supports his testimony and, therefore, he must be lying. Third, she points out that during his deposition Mr. Stewart admitted to embellishing the affidavit he submitted to Genworth.

The first two grounds can be disposed of easily. Although it is true that Mr. Saviano waited four months to contact Genworth, Mr. Stewart testified that he contacted Mr. Saviano about the error almost immediately. Ms. Desia has not presented any contrary evidence and, in fact, Mr. Solomon testified that Mr. Stewart spoke with Mr. Saviano shortly after Dr. Bess's death. *See* A.G. Edwards Mot. for Summ. J. [doc. # 195], Ex. G at 91 (Solomon deposition). It seems strange that a delay on the part of Mr. Saviano, the Estate's attorney, could be used to attack the credibility of Mr. Stewart. And although Ms. Desia wants to accuse Mr. Stewart of forging Dr. Bess's signature on other change of beneficiary forms, her argument that Mr. Stewart has not presented any evidence to corroborate his testimony is not the same as presenting evidence herself. Mr. Stewart testified about these matters in his deposition and Ms. Desia has not presented any evidence to the contrary.

Furthermore, the Court finds Ms. Desia's forgery theory inherently implausible. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005) (holding that

courts are not required to accept implausible version of facts on summary judgment). Desia apparently believes that Mr. Stewart forged Dr. Bess's signature on several change of beneficiary forms for other annuities (not the Genworth annuities) that were supposed to benefit Julius Solomon. Later, these change of beneficiary forms were voided by the insurance companies at the request of Mr. Stewart and the proceeds went to Mr. Solomon as planned. But why, if Mr. Stewart was indeed attempting to defraud Mr. Solomon out of money, would Mr. Stewart forge Dr. Bess's signature just to spend his time and energy to make sure Mr. Solomon received the money to which he was entitled? If Ms. Desia is arguing that Mr. Stewart forged these forms after the initiation of the lawsuit in some sort of attempt to obscure his actions on the Genworth annuities, then how does Ms. Desia explain the letter sent from Mr. Saviano to Julius Solomon's attorney on March 9, 2000, confirming that the errors had been fixed? *See* Reply Aff. of Constantino Fragale [doc. # 246], Ex. L. Ms. Desia does not explain these inconsistencies, nor does the Court believe she can explain them.

It is true, as Ms. Desia contends, that Mr. Stewart admitted to embellishing the affidavit he sent to Genworth in 2000. However, the embellishments were minor and immaterial to the central issues in this case. For instance, Mr. Stewart stated that it became clear in late August 1999 that Dr. Bess's illness was "life threatening." In his deposition, he admitted that at the time he did not know it was life threatening. Of course, Dr. Bess's illness was life threatening; she died as a result of it. To call this an inconsistency is a stretch to say the least. Mr. Stewart also testified that his

statement that "I forwarded the change forms to the appropriate annuity companies and on August 26, 1999 Dr. Bess passed away" was misleading because he actually had forwarded the change forms on the same day as she died. Again, this strikes the Court as more of a clarification than an inconsistency. The third inconsistency Mr. Stewart identified is the fact that he moved offices in the middle of 1999 and he got confused about which office he was working in when the events in the affidavit transpired. In fact, his affidavit states that he had previously worked in both offices and does not specify in which office he was working at the time. Thus, this seems to be more of a confusion on the part of Mr. Stewart during his deposition than an actual inconsistency in his affidavit. The Court simply does not believe that what Mr. Stewart described in his deposition as "embellishments" amount to inconsistencies or falsehoods that call his testimony about Dr. Bess's intent into question. And Ms. Desia has not identified anything else in Mr. Stewart's lengthy deposition testimony that was inconsistent.

Since much depends on the truthfulness of Mr. Stewart's account, the Court ordinarily would be hesitant to grant summary judgment. But there are additional factors in this case that lead the Court to the conclusion that summary judgment is appropriate. First of all, Mr. Stewart's testimony is less suspect than it otherwise might be because he is not the movant, nor does he have any prior relationship with Genworth other than as a co-defendant in this lawsuit. Ordinarily, the Court would be reluctant to accept the testimony of a movant, or someone associated with a movant, on summary judgment because the movant has an interest in the outcome of the case that might call into question

the movant's credibility. *Cf. Westport Ins. Corp. v. Laschever*, 06-cv-519, 2008 U.S. Dist. LEXIS 74878, 2008 WL 4426899, at * 9 (D. Conn. Sept. 26, 2008) (finding that affidavit from movant's employee regarding the construction of the contract had "inherent credibility issues"). Granted, as a third-party defendant, Mr. Stewart currently has an interest in whether Genworth is held liable. But Mr. Stewart wrote his affidavit -- which is consistent with his later deposition testimony -- well before the lawsuit was filed or, indeed, before any claim by Ms. Desia or anyone else was even anticipated. Ms. Desia already has had a chance to question Mr. Stewart at length about the truthfulness of the affidavit at his deposition, and "where the plaintiff has had the opportunity to depose the defendant to test the defendant's veracity and the plaintiff has failed to 'shake' the defendant's version of the facts . . . summary judgment for the defendant may ordinarily be granted." *Corrugated Paper Products*, 868 F.2d at 914.

Neither has Ms. Desia identified any motive that Mr. Stewart might have had to defraud Mr. Solomon out of the proceeds of the annuities. Ms. Desia's counsel admitted at oral argument that it appears that Mr. Stewart had nothing to gain by changing the beneficiaries of the annuities or correcting his error with Genworth. Mr. Stewart received nothing from Dr. Bess's will, nor did it benefit him financially to have the proceeds of the annuities go to Dr. Bess's sisters rather than to Mr. Solomon. In fact, Mr. Stewart testified that he had never met or talked to Dr. Bess's sisters prior to Dr. Bess's death. *See* Supp. Aff. Re Def.'s Mot. For Summ. J. [doc. # 249], Ex. 20 at 65 66. In addition, Mr. Stewart was a close friend of Dr. Bess and interacted

socially with both her and Mr. Solomon. In fact, Mr. Stewart came to the hospital the day that Dr. Bess died, brought Mr. Solomon home, and stayed with him over three hours to comfort him. *See* A.G. Edwards Mot. for Summ. J. [# 195], Ex. G at 88-92 (Solomon deposition). Thus, there is nothing in the record -- and Ms. Desia certainly cites nothing -- to suggest that Mr. Stewart harbored any ill will towards Mr. Solomon. *Cf. Medeiros v. John Alden Life Ins. Co. of New York*, Nos. 89 CIV. 1278, 88 CIV. 4399, 1990 U.S. Dist. LEXIS 10393, 1990 WL 115606, at * 7 (S.D.N.Y. Aug. 10, 1990) (holding that credibility issues existed in a case concerning a potentially fraudulent beneficiary form, where the evidence suggested that the movant's relationship with the decedent was fraught with difficulties before her death); *Real Property*, 480 F.3d at 845 ("[I]f the testimony of a witness . . . is necessary to carry the movant's burden of proof, we look carefully at whether the witness is unbiased.").

Moreover, it is not as though Mr. Stewart's affidavit to Genworth and testimony cast him in a positive light. Quite the contrary, Mr. Stewart effectively admitted to Mr. Saviano and Genworth that he was incompetent in handling Dr. Bess's affairs. In his deposition, he also acknowledged that he made a "grave mistake." Supp. Aff. *re* Def.'s Mot. for Summ. J. [doc. # 249], Ex. 20 at 46. Why Mr. Stewart would choose to portray himself in such an unflattering manner, before the threat of a lawsuit or a claim even existed, is beyond the Court. And, of course, Ms. Desia, provides no explanation. Thus, Ms. Desia has failed to show any "specific bases for possible impeachment," which would, in other situations, cause the Court to deny summary judgment.

See Wantanabe Realty Corp. v. City of New York, 315 F. Supp. 2d 375, 394 (S.D.N.Y. 2003).

Furthermore, Genworth has presented documentary evidence that corroborates key parts of Mr. Stewart's testimony. *See Gottlieb*, 84 F.3d at 519 (granting summary judgment even though witness credibility was disputed because witness's testimony was corroborated by independent evidence); *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 81 (5th Cir. 1987) (noting that affidavits "not corroborated by other evidence" deserve closer scrutiny). Most notably, the letter sent by Mr. Saviano to Mr. Stewart makes it clear that the annuities were supposed to be changed to Dr. Bess's Estate, not to the Solomon Trust. At oral argument, Ms. Desia's counsel argued for the first time that this letter had been falsified. But there is absolutely no evidence to support this contention. Arguments of counsel are not evidence.

Finally, this is not a case in which the testimony concerns facts that are completely in control of the witness, such as the witness's own state of mind or intent. *Cf. Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000) ("[W]here intent and state of mind are in dispute, summary judgment is ordinarily inappropriate."). Thus, this is not a case where a supervisor testifies about his intent in terminating an employee and then demands that the Court accept the supervisor's statement of intent as a proven fact. Rather, Mr. Stewart has testified concerning events that occurred in his presence; the Court has already stated that Mr. Stewart's intent is irrelevant. Ms. Desia -- who claims to have been present during the discussion between Dr. Bess and Mr. Stewart and who was a close friend of Dr. Bess -- is in an equal, perhaps

even a better, position than Mr. Stewart to provide evidence of Dr. Bess's intent. Yet, with the exception of her testimony regarding Dr. Bess's question to Mr. Stewart, she has produced none. *See, e.g., Hart v. Rogers*, No. 550066, 2001 Conn. Super. LEXIS 3046, 2001 WL 1375967, at * 3 (Conn. Super. Oct. 16, 2001) ("Because the plaintiff has failed to produce any evidence demonstrating the decedent's intent to benefit the plaintiff by transferring her property to the defendants, the defendants are entitled to summary judgment on the first count of the complaint.").

In sum, this is an extraordinarily rare case. Mr. Stewart, who is not aligned with Genworth and has no interest in this litigation, has set forth a plausible and supported explanation of the events surrounding his meeting with Dr. Bess to obtain her signature on the blank change of beneficiary forms. Ms. Desia, by contrast, not only has provided no evidence to contradict Mr. Stewart's version of those events, but also has not put forth any basis on which a reasonable jury could question Mr. Stewart's credibility. If this were even a remotely close question, the Court would not hesitate to send the case to a jury. But it is not a close question, even giving Ms. Desia the benefit of all reasonable inferences. The Court should not send this case to a jury on the sole basis of Ms. Desia's counsel's unfounded hope that he will be able to discredit Mr. Stewart on the witness stand. "Hope alone will not raise a triable issue." *United States v. Pilot Petroleum Assoc., Inc.*, 712 F. Supp. 1077, 1082 (E.D.N.Y. 1989).

V.

Because the Court concludes that no reasonable jury could find that the Solomon Trust is entitled to the

proceeds of the annuities, the Court finds that Genworth is not liable to Ms. Desia for breach of contract. And because the claims against Mr. Saviano, Mr. Stewart, and A.G. Edwards are dependent on a finding of liability against Genworth, their motions for summary judgment are moot.

For the foregoing reasons, Genworth's Motion for Summary Judgment [doc. # 185] is GRANTED. Accordingly, Defendant Saviano's Motion for Summary Judgment [doc. # 183] is DENIED as moot, and Defendants A.G. Edwards and James Stewart's Motion for Summary Judgment [doc. # 195] is DENIED as moot. **The Clerk is directed to close this file.**

IT IS SO ORDERED.

/s/ Mark R. Kravitz

United States District Judge

Dated at New Haven, Connecticut: October 24, 2008.

Footnotes

1 During the course of the litigation, Defendant and third-party Plaintiff, GE Life & Annuity Assurance Co. changed ownership and became Genworth Life and Annuity Insurance Company.

2 Mr. Solomon was later bequeathed the New Haven, Connecticut house in Dr. Bess's will, although he had not yet gained ownership of (but was residing in) the house when Genworth sent the confirmation letters.

3 Ms. Desia originally filed a Cross Motion for Summary Judgment [doc. # 203], arguing that there was no factual dispute that Barbara Bess Trust was the

Solomon Trust. Ms. Desia's counsel withdrew the motion at oral argument.

4 In fact, the proceeds could not have been paid to the Unitrust because the trust had been invalidated by the IRS for having failed to meet all the necessary requirements before Dr. Bess's death.

5 Ms. Desia later withdrew her claim against A.G. Edwards. *See* Mot. to Withdraw Pl.'s Breach of Contract Claim [doc. # 221].

6 Ms. Desia also filed a suit in state court, which is still pending, against certain of the third-party Defendants.

7 Marilyn Bess Bennett was later dropped from the case on account of her death. *See* Notice of Voluntary Dismissal of Party Marilyn Bess Bennett [doc. # 142].

8 The Court would also point out that none of the documents Ms. Desia submits refers to the Solomon Trust as the "Barbara Bess Trust" without some additional language such as "f/b/o Julius Solomon."

NO. 3:05 CV 1395 (MRK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

ROSE DESIA, Trustee Barbara Bess Trust, F/b/o Julius Solomon,
Plaintiff,

v.

GE LIFE & ANNUITY ASSURANCE CO.,
Defendant and Third-Party Plaintiff,

v.

CHRISTOPHER COUTURE, individually, and in his capacity as Executor of the Estate of Barbara Bess, EDWARD S. SAVIANO, JAMES STEWART, A.G. EDWARDS & SONS, INC., MARILYN BESS BENNETT, BETSY L. PALOZZI, and THE ESTATE OF BARBARA BESS,
Third-party Defendants.

STIPULATION OF FACTS

It is hereby stipulated and agreed by plaintiff Rose DeSia, Trustee of the Trust u/a Barbara Bess dated December , 1998 f/b/o Julius Solomon, through her undersigned attorney Costantino Fragale, and defendant GE Life and Annuity Assurance Company, now known as Genworth Life and Annuity Insurance Company ("GLAIC"), through its undersigned attorneys Sonnenschein Nath & Rosenthal LLP, that the following material facts are true for purposes of

GLAIC's summary judgment motion and plaintiff's summary judgment motion only:

Stipulation of Facts

1. Barbara Bess purchased two annuities from Life of Virginia in January, 1997. The original beneficiaries of each were her sisters, Betsy Palozzi and Marilyn Bess Bennett. Annuity contract number T06066457, bearing bates G 0250-283, and number T06066458, bearing bates numbers G 0284-320. are the contracts annuity that Dr. Bess purchased.

2. In December 1998, Dr. Bess established the "Trust u/a Barbara Bess dated December __, 1998 f/b/o Julius Solomon." Mr. Solomon was the sole beneficiary of this trust, Plaintiff Rose DeSia, Solomon's cousin, was named trustee of this trust. A correct copy of this trust agreement bears bates numbers G 0087-111.

3. On March 27, 1999, Dr. Bess established the "Barbara Bess Charitable Remainder Unitrust." Her sisters, Mm. Palozzi and Ms. Bennett, and her nephew, Christopher Couture, were the beneficiaries. Mr. Couture was a co-trustee, and A.G. Edwards Trust Company was the other co-trustee. A correct copy of this trust agreement bears bates numbers AGE 8230-258.

4. On August 28, 1999 Dr. Bess died at Yale New Haven Hospital.

5. On August 26, 1999, change of beneficiary form signed by Dr. Bess was faxed to GLAIC by A.G. Edwards representative James Stewart A correct copy of this document is bates numbered G 0211, and correct

copies of the complete form used (both sides) is found at plaintiffs' production bates numbers 000 145-48.

6. When Dr. Bess died the annuities were in force. When Dr. Bess died, income payments under the annuities had not begun. On August 30, 1999, GLAIC mailed to Dr. Bess at her 20 Robin Lane address confirmations that GLAIC had changed the beneficiary on each annuity to "Barbara Bess Trust."

7. In January, 2000, Edward Saviano the attorney for Dr. Bess' estate and her estate planning lawyer, wrote to GLAIC that Mr. Stewart had given Dr. Bess a blank form to sign, that Mr. Stewart later completed the form incorrectly and that the estate plan called for Dr. Bess's estate, not the trust, to be the beneficiaries, and requested that GLAIC disburse the proceeds to Dr. Bess's sisters. Mr. Saviano included a sworn affidavit from Mr. Stewart containing substantially the same statements and identifying the "Barbara Bess Trust" referred to in the beneficiary form to be "her Charitable Remainder Unitrust." A correct copy of Mr. Saviano's letter and its enclosures, including Mr. Stewart's affidavit, are bates numbered G 0203-225.

8. After further communications, in March, 2000, GLAIC received affidavits from Dr. Bess' nephew Christopher Couture and Peter Aster, a Vice President of A.G. Edwards Trust Company. Mr. Couture and Mr. taster gave the affidavits as the co-trustees of the "charitable remainder unitrust established by Barbara Bess, as grantor, under the trust agreement dated March 27,1999." They identified this trust to be the one referenced in the change of beneficiary form and directed that the proceeds of the annuities be paid to

Dr. Bess' sisters, Betsy Palozzi and Marilyn Bess Bennett. Correct copies of these affidavits and their cover letters are bates numbered G 0151-162 and G 0163 -176.

9. On April 27, 2000, GELAAC paid the full amount of both annuities, totaling $622,316.30, to Dr. Bess' estate, Ms. Palozzi and Ms. Bennett, as directed by Mr. Couture and Mr. Saviano.

10. GLAIC disbursed the proceeds of the two annuities to the sisters and the estate in reliance on the sworn affidavits of both co-trustees of the Unitrust, and also in reliance on the Stewart affidavit and Mr. Saviano's letters.

11. The only trust relating to Dr. Bess that GLAIC was apprised of when it paid the annuities was the charitable remainder unitrust.

12. On June 6, 2003, Ms. DeSia wrote for the first time to GLAIC. Neither Ms. DeSia, Mr. Solomon nor anyone else representing the trust created for the benefit of Julius Solomon contacted GLAIC until June 6, 2003.

13. On June 26, 2003, GLAIC employee Jim Webb wrote back to Ms. DeSia, detailing GLAIC's disbursement of the annuities three years before, and identifying the documents and instructions upon which GLAIC relied.

Dated as of May 27, 2008

January 11, 2010
No. 08-5641-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSE DESIA, Trustee Barbara Bess Trust, f/b/o Julius Solomon,
Plaintiff-Appellant,

v.

GE LIFE & ANNUITY ASSURANCE CO.,
Defendant-Third-Party-Plaintiff-Appellee,

A.G. EDWARDS & SONS, INC.,
Defendant-Third-Party-Defendant,

BETSY L. PALOZZI,
Cross-Defendant-Third-Party-Defendant,

MARILYN BESS BENNETT, CHRISTOPHER COUTURE, ESTATE OF BARBARA BESS, GELAAC, EDWARD S. SAVIANO, JAMES B. STEWART, Third-Party-Defendants.

PRESENT: REENA RAGGI, DEBRA ANN LIVINGSTON, Circuit Judges, BRIAN M. COGAN, District Judge.*

Rosa Desia having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is

DENIED.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk

By:s/
Frank Perez, Deputy Clerk

Footnote

* District Judge Brian M. Cogan of the United States District Court for the Eastern District of New York, sitting by designation.

JUN 10 2010

No. 09-1246

IN THE

Supreme Court of the United States

ROSE DESIA,
Trustee of the BARBARA BESS TRUST,

Petitioner,

v.

GENWORTH LIFE AND ANNUITY
INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Lawrence E. Fenster*
ANDREW W. SIDMAN
Counsel of Record
DAVID G. SMITHAM
BRESSLER, AMERY & ROSS, P.C.
17 State Street, 34th Floor
New York, NY 10004
(212) 425-9300
asidman@bressler.com

Attorneys for Respondent

SUPREME COURT

230496

COUNSEL PRESS

STATEMENT PURSUANT TO RULE 29.6

The Parent Company of Genworth Life and Insurance Company ("Genworth"), f/k/a General Electric Capital Assurance Company ("GELAAC"), is Genworth Financial, Inc. No publicly traded company owns 10% or more of Genworth's stock.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 ... i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES vi

STATEMENT OF THE CASE 1

BACKGROUND 2

STATEMENT OF FACTS 6

(i) Bess Maintained Accounts At A.G. Edwards 6

(ii) Bess Created Two Trusts Pursuant to Her Estate Plan And Neither Trust Was Called The "Barbara Bess Trust" 7

(iii) Bess Agreed To Change The Beneficiaries Of All Her Qualified Savings To Her Estate 8

(iv) Bess Signed The Change Of Beneficiary Forms In Blank And Told Stewart To Speak To Saviano About The Beneficiaries To Insert 10

(v) Bess' Purported Question Whether Desia Had To Sign The Forms 11

Contents

Page

(vi) Desia's Actions Show That She Never Believed That Bess' Purported Question Reflected Any Intent To Make The Solomon Trust The Beneficiary Of The Genworth Annuities 11

(vii) Bess' Death And Stewart's Mistaken Completion Of The Change Of Beneficiary Forms 13

(viii) Saviano, Not Stewart, Coordinated The Effort To Request That Genworth Change The Beneficiaries From The Unitrust Back To Bess' Sisters 15

(ix) Genworth Properly Paid The Annuities to Palozzi and Bennett 16

(x) The District Court Granted Genworth's Motion for Summary Judgment 17

(xi) The District Court Dismissed Plaintiff's Allegations Concerning the Credibility of Stewart 18

(xii) The Second Circuit Affirmed the Decision 19

Contents

Page

ARGUMENT 20

POINT I

THE DISTRICT COURT PROPERLY DETERMINED THAT UNDISPUTED FACTS SHOWED THAT GENWORTH HAD PAID THE ANNUITIES TO THE BENEFICIARIES INTENDED BY BESS AND THEREFORE DESIA'S CONTRACT CLAIM MUST BE DISMISSED 20

(i) A District Court Should Grant a Motion for Summary Judgment As a Matter of Law Where There Exist No Genuine Issues of Material Fact that Would Permit a Reasonable Jury to Find for the Non-Movant 20

(ii) Genworth Met Its Burden to Show that There Were No Issues of Material Fact Concerning The Issue of Whether Bess' Sisters Were The Rightful Beneficiaries Of The Annuities 22

(iii) Desia Failed to Meet Her Burden to Raise a Genuine Issue of Material Fact Once the Court Determined that Bess' Sisters Were The Rightful Beneficiaries Of The Annuities 24

Contents

Page

POINT II

DESIA'S ARGUMENTS CONCERNING STEWART'S CREDIBILITY DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT 27

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 20, 21, 27, 30

Beal v. Lindsay,
468 F.2d 287 (2d Cir. 1972) 27

Bouboulis v. Transp. Workers Union of Am.,
442 F.3d 55 (2d Cir. 2006) 21

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 20, 21

Citizens Bank of Clearwater v. Hunt,
927 F.2d 707 (2d Cir. 1991) 26

Crawford-El v. Britton,
523 U.S. 574 (1998) 27, 28

Gottlieb v. County of Orange,
84 F.3d 511 (2d Cir. 1996) 27

Holcomb v. Iona College,
521 F.3d 130 (2d Cir. 2008) 21

Island Software & Computer Service, Inc. v. Microsoft Corp.,
413 F.3d 257 (2d Cir. 2005) 28

Cited Authorities

Page

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 20, 21, 24

McCullogh v. Wyndach Union Free Sch. Dist., 187 F3d 272 (2d Cir. 1999) 27

Meiri v. Dacon, 759 F2d 989 (2d Cir. 1985) 26

Modern Homes Inst., Inc. v. Hartford Accident Indem. Co., 513 F2d 102 (2d Cir. 1975) 27

Schoonejongen v. Curtiss-Wright Corp., 143 F3d 120 (3d Cir. 1998) 28

United States v. Real Property, 480 F3d 841 (8th Cir. 2007) 28

State Cases

Bigley v. Pacific Standard Life Insurance Company, 229 Conn. 459 (1994) 17, 22

STATEMENT OF THE CASE

Petitioner appeals from a Memorandum Of Decision (the "Decision") issued by the Connecticut District Court, Hon. Mark R. Kravitz presiding, granting summary judgment in favor of General Electric Annuity and Assurance Company n/k/a Genworth Life and Annuity Insurance Company ("Genworth"), which Decision was affirmed by the summary order (the "Order") of the United States Court of Appeals for the Second Circuit.

Petitioner misstates the basis on which the lower courts granted the motion for summary judgment and then affirmed the Decision. Petitioner states that the lower courts relied on a witness' credibility to "extinguish genuine issues of material fact." The Second Circuit, however, affirmed that Respondent had met its burden to show that no genuine issue of material fact existed that would permit a reasonable jury to return a verdict for Petitioner and that Petitioner then failed to meet her burden to adduce affirmative evidence sufficient to defeat the motion. The Second Circuit also properly held that in light of all the evidence proffered by Respondent in support of its motion, Petitioner's general attack on the credibility of a witness, even if believed, was insufficient to provide evidence that would permit a jury to find for Petitioner.

Respondent respectfully requests that the judgment of the Second Circuit be affirmed.

BACKGROUND

This petition is the latest — and should be the last — attempt by Petitioner to take advantage of an inadvertent mistake and try to use that error to create a windfall for Petitioner, even though that result would fly in the face of the facts, the law and common sense.

The Order affirmed the dismissal of a claim for breach of contract by Petitioner Rose Desia, as Trustee of the Barbara Bess Trust, f/b/o Julius Solomon ("Desia" and "the Solomon Trust," respectively). Desia alleged that the Solomon Trust was the third-party beneficiary of two annuity contracts (the "Genworth Annuities"), owned by decedent Dr. Barbara Bess ("Bess") and issued by Genworth and that Genworth breached those contracts by paying their proceeds to Bess' sisters, Marilyn Bess-Bennett ("Bennett") and Betsy Palozzi ("Palozzi"), rather than to the Solomon Trust.

The petition alleges that the lower courts determined that it was Bess' intent that her sisters be the beneficiaries of the Genworth Annuities and resolved genuine issues of material fact "relying solely on the strength" of a witness' credibility. Petition at p. 18. This is untrue. The Second Circuit, viewing all of the evidence in the record in the light most favorable to Desia, concluded that Genworth had presented sufficient evidence to establish that Bess intended the beneficiaries of the Genworth Annuities to be her sisters, and not the Solomon Trust. (*See* Order, App. 5a and JA 400-401)[1]. Genworth had thus met its burden of

1. The letters "App." refer to the appendix attached to the petition and "JA" refer to the parties' "Joint Appendix" filed with the Second Circuit.

showing that there was no genuine issue as to any material fact that would permit a reasonable jury to return a verdict for Desia.

Even after the completion of extensive discovery,[2] Desia was not able to present documentary or testimonial evidence to contradict Genworth's showing. Decision, App. 18a. Instead, Desia merely attacked the credibility of a witness on collateral issues. As the lower courts held, such an attack was insufficient to defeat Genworth's motion.

Desia principally argues that the District Court (i) ignored material facts from which a jury could have drawn an inference that Bess intended that the Genworth Annuities benefit her friend, Julius Solomon ("Solomon"), the beneficiary of the Solomon Trust, and (ii) resolved credibility issues in favor of a witness, James Stewart ("Stewart"), Bess' former financial adviser at A.G. Edwards and Sons ("AGE"). The Second Circuit properly rejected these arguments.

It is undisputed that Bess' sisters were the original beneficiaries of the Genworth Annuities and Desia presented no evidence to show that Bess intended to change the beneficiaries to the Solomon Trust. Pursuant to an estate plan developed by Bess' attorney, Bess signed change of beneficiary forms for the Genworth Annuities. Stewart testified that they were blank when

2. Petitioner alleges that the motion for summary judgment was filed "after some discovery." In fact, discovery, including the taking of eight (8) depositions, had been completed prior to the filing of the parties' motions for summary judgment.

Bess signed them and this evidence is "uncontradicted." Decision, App. 17a. Neither Solomon nor Desia, both of whom claimed to have been present with Bess on the day she signed the forms, saw any writing on the forms other than Bess' signature. Thus, Stewart's testimony that he took the blank forms and later entered the words "Barbara Bess Trust" to mean another trust established for Bess, and not the Solomon Trust, is undisputed.[3]

Both Genworth and Petitioner agree that it is Bess' intent, not that of any other person, that governs the issue of entitlement to the Genworth Annuities. App. 13a. Genworth produced evidence showing that Bess intended her sisters to be the beneficiaries of the Genworth Annuities. App. 15-16a. In the face of such evidence, the lower courts concluded that Petitioner's evidence that Bess made brief and ambiguous comments to Petitioner on the day she signed the foregoing forms in blank, in the context of the undisputed facts presented, did not create a genuine issue of material fact with respect to Bess' intent. Order, 3a; Decision, App. 18a.

Desia's assertion that in granting the motion the District Court improperly determined that Stewart's testimony was credible also lacks any merit. As the

3. Petitioner alleges that at her deposition, Desia testified that the forms were not blank when Bess signed them. Petition at page 10, para. 1. This allegation is untrue. In fact, Desia testified that she did not see what was written on the forms and Solomon testified that he was not present when they were signed. (JA 404, p. 11; AA 189-190, pp. 11-12.) The letters "AA" refer to the Appellee's Appendix filed with the Second Circuit.

Second Circuit held, the District Court "carefully and accurately" detailed the evidence in the record below to determine that Genworth had demonstrated Bess' intent that the Genworth Annuities benefit her sisters through documents and witnesses other than Stewart. In light of this evidence, the issue of Stewart's credibility is a "red herring." Although credibility determinations usually are jury functions, a plaintiff may not defeat a properly-supported motion for summary judgment solely with general or collateral attacks on a witness' credibility. Rather, a plaintiff must offer affirmative, concrete evidence that demonstrates genuine issues of material fact. This Desia did not do. Order, App. 3a.

Genworth met its burden to initially demonstrate the absence of a genuine issue of material fact and properly supported its motion for summary judgment. Desia, however, then failed to meet her burden to identify affirmative evidence from which a jury could find that Bess ever intended to deprive her sisters of the assets in the Genworth Annuities. Instead, Desia simply responds with general attacks upon a defendant's credibility. None of the points raised in Petitioner's attacks on the credibility of Stewart's evidence, however, are germane to the central issue in this case: Bess' intent with respect to the Genworth Annuities.

Desia asserts that the lower courts "distorted" the "Rule 56 procedure" and should have denied Genworth's motion in order to permit a jury to review Stewart's testimony. If Petitioner were to prevail, however, any non-moving party could defeat a summary judgment motion by simply stating that there were credibility issues with a witness' testimony, effectively rendering

Rule 56 meaningless. The Decision was, in fact, consistent with the intent of Rule 56: to permit trial only when there are genuine issues of material fact that would permit a reasonable jury to return a verdict for the non moving party and to eliminate those frivolous claims that have no factual basis.

STATEMENT OF FACTS

(i) Bess Maintained Accounts At A.G. Edwards

In 1993, Bess opened securities accounts with AGE, for which Stewart was the financial adviser. (*See* JA 280, Stewart Tr. 20-21.)[4] During the mid 1990s, Bess purchased a total of seven annuity contracts through Stewart and AGE (the "Annuities"), including the two Genworth Annuities in issue in this case. (JA 151, ¶ 3.) The joint beneficiaries of both Genworth Annuities were Bess' sisters, Bennett and Palozzi. (JA 151, at ¶4 and 8.)

Solomon was the sole beneficiary of three of the Annuities. These Annuities were issued by AIG Ovation, Nationwide Best of America and American Legacy II Lincoln. (JA 390, Saviano Tr. 640.) (*See also* JA 151, ¶6.) When Bess died, Solomon received the proceeds of these three Annuities which were worth in excess of $1 million before estate taxes. (*See* AA 6). The beneficiaries of the remaining annuities, issued by American Legacy II and Nationwide Fidelity Advisor, were Bennett and Palozzi jointly, and Bess' nephew, Christopher Couture ("Couture"), respectively. (JA 151, ¶¶ 7-8.)

4 The letters "Tr." refer to the deposition transcripts of various witnesses.

(ii) Bess Created Two Trusts Pursuant to Her Estate Plan And Neither Trust Was Called The "Barbara Bess Trust"

In 1998, Bess decided to create an estate plan and consulted a tax lawyer, Saviano. (JA 362-363 and 365, Saviano Tr. pp. 7, 10 and 23-24.) From mid-1998 through August 1999, Saviano helped Bess to develop such a plan. (JA 384, Saviano Tr. 534). As part of the estate plan, Saviano created a will and two trusts. (JA 370, Saviano Tr. 89). Bennett, Palozzi and Couture were the residual beneficiaries of Bess' will. Neither of the trusts was titled the "Barbara Bess Trust." (JA 39, ¶¶ 2-3) Rather, the trusts were named as follows:

(a) **Trust u/a Barbara Bess dated December __ 1998 f/b/o Julius Solomon** (the "Solomon Trust"). *See* copy of the agreement creating the Solomon Trust (the "Solomon Trust Agreement") at page 3, Section F. (JA 199.)

(b) **Barbara Bess Charitable Remainder Unitrust** (the "Unitrust"). (*See* copy of the agreement creating the Unitrust (the "Unitrust Agreement") at page 3, Section D. (JA 72.)

The purpose of the Solomon Trust was to create an entity that Bess would fund with annual tax-free gifts up to the maximum exclusion ($10,000 per beneficiary) permitted under I.R.S. rules. This structure would enable Solomon to receive the assets in the Solomon Trust free of gift and estate tax after Bess' death.

(JA 379-380, Saviano Tr. 276-278). Desia was the trustee of the Solomon Trust. (JA 227, Desia Tr. 51.)

The purpose of the Unitrust was to create an entity that would be exempt from income tax and give its beneficiaries the best "economic value" of the assets that Bess left to them after her death. (AA 178, Saviano Tr. 101). The beneficiaries of the Unitrust were Bess' remaining blood relatives, her sisters Bennett and Palozzi, and Bess' nephew, Couture. (*See* JA 72, Section H; JA 371, Saviano Tr. 102). Couture and A.G. Edwards Trust Co. ("AGE Trust") were named the co-trustees of the Unitrust. (*See* JA 83, Section A.) The Unitrust was to be funded by changing the beneficiaries of Bess' qualified, i.e., retirement, accounts, savings and annuities to her Estate and then when she died, the funds would pour into the Unitrust. (JA 371, Saviano Tr.102).

(iii) Bess Agreed To Change The Beneficiaries Of All Her Qualified Savings To Her Estate

On or about July 27 1999, Saviano recommended, and Bess agreed, that Bess should change the beneficiaries of her qualified savings to her Estate. No changes were to be made to the beneficiaries of her non-qualified holdings. Bess instructed Saviano to tell "Stewart what to do on her death beneficiary designations." (JA 366-367 and JA 386, Saviano Tr. 29-30 and 610). More specifically, she asked Saviano to send a letter to Stewart to "make sure it was done right." (JA 387, Saviano Tr. 612).

There was no discussion at that time, or any other time, about changing the beneficiaries of the Genworth Annuities, or any of Bess's other Annuities, to the Solomon Trust. (JA 386, Saviano Tr. 609-610). To the contrary, Bess and Saviano had discussed "capping" the already substantial amount that Solomon was to receive upon her death. (JA 386, Saviano Tr. 608). Bess said that, if and when the value of the Solomon Trust had increased to equal the value of one of the Annuities of which Solomon was a beneficiary, Bess would change the beneficiary of that Annuity to her sisters. (JA 386, Saviano Tr. 608).

One of the Genworth Annuities was qualified and one was non-qualified. (*See* JA 151, ¶¶ 4-5.) Thus, pursuant to Bess' instructions, as reflected in Saviano's letter, the only change that was intended with respect to those investments was to the beneficiary of the qualified annuity, which should have been changed to Bess' Estate.

Following the discussion between Bess and Saviano about changing certain of her beneficiaries, on July 28 1999, Saviano sent a letter to Stewart, instructing him to change the beneficiaries on Bess' "qualified retirement savings" to the Estate of Barbara Bess. (JA 386, Saviano Tr. 611). (*See also* JA 107.) Saviano sent a copy of that letter to Bess. Bess did not respond to the letter or otherwise tell Saviano that anything in the letter was incorrect.

Stewart does not recall reviewing Saviano's letter at or about the time that it was received at his office in late July or early August 1999. (JA 285, Stewart Tr. 45).

Nevertheless, by early August 1999, Stewart had learned that Bess had completed her planning for the Estate. (JA 151, ¶10). Bess spoke with Stewart on the phone and told him that the names of beneficiaries of Annuities were to be changed to be "consistent" with her new estate plan. (JA 303, Stewart Tr. 225).

(iv) Bess Signed The Change Of Beneficiary Forms In Blank And Told Stewart To Speak To Saviano About The Beneficiaries To Insert

On Sunday, August 15, 1999, Stewart visited Bess at her house in Connecticut to have her sign change of beneficiary forms for the Annuities. (JA 152, ¶11). Solomon was present at Bess' residence on that day. (*See* AA 67, Solomon Tr. 228). Desia alleges that she also was present.[5] (*See* JA 230, Desia Tr. 104.)

Stewart mistakenly understood that the beneficiaries of all of the Annuities – not just the qualified Annuities — were to be changed, but he was unsure which should be changed to the Estate and which to the Unitrust. (JA 152, ¶13.) Although Stewart had attempted to reach Saviano to clarify these issues, he had not spoken to him. (JA 295, Stewart Tr. 173). As a result, Stewart took blank change of beneficiary forms for all of the Annuities, both qualified and non-qualified, to Bess' home and presented them to her for signature.

Bess signed the blank forms for all her Annuities, including the Genworth Annuities. (JA 152, ¶11). Bess

5. Stewart testified that Desia was not in the kitchen when Bess signed the beneficiary forms, but she may have been upstairs. (JA 306 and 308, Stewart Tr. 234-236 and 253.)

told Stewart to speak to Saviano to find out which beneficiaries needed to be changed and to whom. (JA 304, Stewart Tr. 226). Contrary to the allegations in the petition, Solomon and Desia admit that they did not see any reference to the "Barbara Bess Trust," or any other writing besides Bess' signature, on the change of beneficiary forms for the Genworth Annuities. (*See* AA 189, at p. 11, Point II; AA 70, Solomon Tr. 238.)

(v) Bess' Purported Question Whether Desia Had To Sign The Forms

Desia alleges that after Bess signed the beneficiary forms on August 15, 1999, ". . . as an afterthought, [Bess] said, Jimmy [Stewart], doesn't Rosie have to sign the forms since she's the trustee?" and Stewart replied, "No." (JA 350, Desia Tr. 119.) Stewart denies that exchange took place, and Solomon testified that he never heard the purported discussion. (JA 289, Stewart Tr. 80; AA 70-71, Solomon Tr. 240 243.) Desia further alleges that after Stewart and Solomon had left the room, Bess said "I don't understand why you don't have to sign these forms. You are the trustee." (JA 274, Desia Tr. 106.)

(vi) Desia's Actions Show That She Never Believed That Bess' Purported Question Reflected Any Intent To Make The Solomon Trust The Beneficiary Of The Genworth Annuities

As of August 1999, Bess had never discussed her Estate Plan with either Desia or Solomon. (*See* AA 189, Point II, JA 233, Desia Tr. 124-125 and JA 233, Solomon Tr. at 66.) More specifically, Bess had never discussed

the Genworth Annuities with either Desia or Solomon, and neither Desia nor Solomon had any prior knowledge that Bess was planning to make any change to the beneficiaries of one of those Annuities. (*See* AA 189, at p. 11, Point II and AA 72, Solomon Tr. 247-248.) Bess never told Desia or Solomon that the Solomon Trust was, or would become, the beneficiary of one or both of the Genworth Annuities. (*See* AA 189, at p. 11, Point II; AA 26, Solomon Tr. 65; JA 233, Desia Tr. 124-125.)

Moreover, Desia's actions after Bess' death confirm that she did not take Bess' purported question as any indication whatsoever that Bess intended to make the Solomon Trust the beneficiary of one or both of the Genworth Annuities. Desia was the trustee of the Solomon Trust and the fiduciary of that trust. However, between August 1999 and June 2003, although Desia spoke with her cousin Solomon two or three times a day, she never even discussed the Genworth Annuities with Solomon. (*See* AA 189-190 at p. 11-12; JA 226-228, Desia Tr. 49-50, 56.) As trustee of the Solomon Trust, Desia received monthly account statements from AGE for an account maintained by the Solomon Trust. (JA 270-272.) Although the Genworth Annuities did not appear on those statements at any time, Desia did not contact Genworth or AGE to ask about the proceeds of the Genworth Annuities. (AA 189-190; JA 235, Desia Tr. 265. In fact, Desia testified that, after Bess died in 1999, Desia made no effort to find out happened to the proceeds of the Genworth Annuities until 2003.

Thus, for nearly four years after Bess' death, Desia did not take a single step to see whether the Solomon Trust had been named the beneficiary of one or both of

those Annuities, or had received the proceeds therefrom. (JA 229, Desia Tr. 61.)

(vii) Bess' Death And Stewart's Mistaken Completion Of The Change Of Beneficiary Forms

On August 26, 1999, Bess died. (AA 31, Solomon Tr. 82). Upon learning of Bess' death, Stewart "was in shock" at the loss of his close friend. He then realized, in a panic, that he had not yet completed the change of beneficiary forms that Bess had signed in blank or sent them to Genworth and the other companies that had issued the Annuities. (JA 152, ¶12-13; JA 299, Stewart Tr. 187-188).[6]

That afternoon, Stewart completed the forms, changing the names of the beneficiaries on each of the Annuities, including the non-qualified Annuities, to either the "Barbara Bess Estate" or the "Barbara Bess Trust." (JA 152, ¶13). When he mistakenly wrote the "Barbara Bess Trust" on certain of the forms – even though Saviano/Bess had not instructed that any of the beneficiaries be so changed — Stewart intended to reference the Unitrust, of which Bennett, Palozzi and Couture were the beneficiaries. (JA 309-310, Stewart Tr. 313-314). Neither Bess, Saviano nor anyone else had ever told Stewart that there was any plan to change the beneficiaries of any of the Annuities to the Solomon Trust, and Stewart did not intend those words to refer

6. Desia alleges that Bess signed two Genworth Beneficiary Forms but Stewart submitted only one form to Genworth which requested that both of the Genworth Annuities be changed. (*See* JA 97.)

to the Solomon Trust. (JA 310, Stewart Tr. 314-315). In any event, because the only change to the Genworth Annuities that Bess had directed was the change of the beneficiary of the qualified Annuity from Bennett and Palozzi to Bess's Estate, both of Stewart's changes were mistakes.

On August 26, 1999, Stewart faxed the change of beneficiary forms to Genworth and the other companies that had issued Bess' Annuities (the "Annuity Companies"). (JA 286, Stewart Tr. 46; JA 152, ¶13). After he had submitted the change of beneficiary forms to the Annuity Companies, Stewart later checked his file for Bess, found Saviano's letter dated July 28, 1999 and realized his errors. (JA 286, Stewart Tr. 46). Stewart was especially concerned that, if the Annuity Companies changed the beneficiaries, as per the change of beneficiary forms, Solomon, who was the beneficiary of three Annuities worth more than $1 million, would not receive those assets. (JA 288, Stewart Tr. 60).

When he realized his errors, Stewart called Genworth and the other Annuity Companies and tried to cancel the instructions on the change of beneficiary forms. (JA 286, Stewart Tr. 46-48). Genworth refused to change the beneficiaries on its Annuities back to Bess' sisters.[7] (*Id.* at JA 286, pp 46-48). Stewart also called Saviano and informed him of the errors. (JA 385, Saviano Tr. 553-555).

7. Only one of the Annuity Companies, AIG, agreed to accept Stewart's telephonic request to change the beneficiary on the annuity back to the original beneficiary. (JA 286, Stewart Tr. 47-48).

(viii) Saviano, Not Stewart, Coordinated The Effort To Request That Genworth Change The Beneficiaries From The Unitrust Back To Bess' Sisters

After Stewart had reported his errors to Saviano and made his initial calls to the Annuity Companies, Saviano instructed that Stewart to do nothing further until Saviano reviewed the matter. (JA 385, Saviano Tr. 554). Saviano also told Stewart that he would undertake to try to correct the errors. (JA 385, Saviano Tr. 554.)

In the meantime, because Bess had died prematurely, Saviano determined that the Unitrust did not qualify, as intended, as a "charitable remainder unitrust" pursuant to I.R.S. regulations. Accordingly, Saviano voided the Unitrust. The voiding of the Unitrust eliminated the tax advantage that would have been realized from changing the beneficiaries of the qualified Annuities to the Estate. (JA 378, Saviano Tr. 230 231).

Saviano's firm then sent letters to Genworth and the other Annuity Companies, requesting that they change the beneficiaries back to the original beneficiaries. (JA 368, Saviano Tr. 63-65). With these letters, Saviano also sent a copy of an affidavit that had been prepared for Stewart (the "Stewart Aff.") which explained the facts leading up to the changes in the beneficiaries of the Annuities, and an affidavit from Couture, the Executor of Bess' Estate.

(ix) Genworth Properly Paid The Annuities To Palozzi and Bennett

At Saviano's request, Genworth agreed to treat the original beneficiaries as the rightful recipients of the proceeds of the Annuities. (JA 392-393, Saviano Tr. 707-708; AA 200) After much work and effort, Saviano's actions persuaded Genworth to change the beneficiaries back to Bess's sisters. (JA 392-393, Saviano Tr. 707-709; AA 200, ¶2.)

The other Annuity Companies also agreed to reinstate the original beneficiaries of Bess' other annuities. Solomon – who had been mistakenly removed as the beneficiary of three other annuities worth more than $1 million due to Stewart's errors – was restored as beneficiary pursuant to that process.

In April 2000, pursuant to the terms of the annuity contracts, Genworth transferred the assets in the Genworth Annuities to Bennett and Palozzi. Each sister received 50% of the net proceeds of the Genworth Annuities, after estate taxes.

Neither Saviano nor Stewart contacted Desia regarding the transfer of the assets in the Genworth Annuities because Desia was not the trustee of the Unitrust and Bess had never advised Stewart or Saviano of any intention that the Genworth Annuities be transferred to the Solomon Trust.

(x) The District Court Granted Genworth's Motion for Summary Judgment

After the completion of discovery, Genworth moved for summary judgment (the "Motion") against Plaintiff. On October 24, 2008, District Judge Mark R. Kravitz granted Genworth's Motion and dismissed the complaint. (JA 401, p. 7.)

The District Court concluded that, resolving all ambiguities and drawing all inferences in favor of the non-movant Desia, Genworth had met its burden of showing that there was no genuine issue as to any material fact and was therefore entitled to summary judgment as a matter of law. (JA 400-401, pp. 7-8.)

The District Court noted that both parties relied upon *Bigley v. Pacific Standard Life Insurance Company*, 229 Conn. 459 (1994) in support of their arguments. Although the parties disagreed about the application of *Bigley* to the instant case, they agreed that *Bigley* was "controlling" and stands for the proposition that it is "the intent of the policy holder that governs the question of who is the rightful beneficiary." (*Id.* at JA 401, p. 8.) The Court stated that Genworth had presented evidence to show that Bess intended the beneficiary of the Genworth Annuities to be her sisters, who actually received the proceeds of the two Genworth Annuities. (*Id.* at JA 401, p. 8.) Further, taking all of the evidence in the record in the light most favorable to Desia, the Court found that she had not presented any evidence to the contrary. (*Id.* at JA 401, p. 8.)

(xi) The District Court Dismissed Plaintiff's Allegations Concerning the Credibility of Stewart

The District Court stated that Desia's arguments concerning the credibility of Stewart's testimony did not warrant denying summary judgment, especially since Desia had raised no genuine disputed issue of material fact supporting her theory of the case. (*Id.* at JA 405, p. 12.)

The District Court also found that the evidence presented by Genworth, including the testimony of Desia and Solomon, that the annuity forms were blank on the date that Bess signed them was "uncontradicted." Decision, App. 19a. Stewart testified that they were blank, Solomon testified that he was not present when they were signed and Desia testified that she did not see what was written on the forms. *Id.*

Desia also states that certain documents contained the words "Barbara Bess Trust," which means the Solomon Trust. However, each of the documents referenced by Desia includes additional qualifying language, such as "f/b/o Julius Solomon," specifically identifying that the document referred to the Solomon Trust. None of the Exhibits identified by Desia referred to the Solomon Trust by the words "Barbara Bess Trust" alone.[8] *See* Decision, App. 30a.

8. In addition, one document was produced in discovery that refers to the Unitrust as the "Barbara Bess Trust." On May 8 2000, David Tobias, Saviano's partner who also worked on the Estate Plan, wrote a letter regarding one of Bess' other Annuities to Lincoln National Life Insurance Company in which referred to the "Barbara Bess Trust" as a shorthand for the Unitrust, not the Solomon Trust. (JA 391, Saviano Tr. 70.)

(xii) The Second Circuit Affirmed the Decision

On October 28, 2009, the United States Court of Appeals for the Second Circuit, reviewing the award for summary judgment *de novo*, affirmed the Decision (Order, App. 1a) The court held that the record was replete with "uncontradicted evidence" that Bess completed the change of beneficiary forms in accordance with her Estate Plan. App. 3a. Bess' estate plan, as developed by Saviano, never anticipated that the Genworth Annuities would be transferred to the Solomon Trust.

The Second Circuit stated that the sole piece of evidence that Desia proffered to support her claim was Desia's own uncorroborated testimony that Bess asked Desia whether Desia had to sign the change of beneficiary form. The Second Circuit affirmed the District Court's holding that this alleged statement raised no triable issue of fact because a jury would be forced to "engage in impermissible speculation to infer from this single enquiry that Bess intended her annuities to be paid to Julius Solomon." Order, App. 3a.

The Second Circuit also addressed the issue of Desia's allegations regarding Stewart's credibility. The Court stated that the attacks on Stewart's credibility, "even if credited," provided no evidence to permit a reasonable jury to find that Bess intended to designate the Solomon Trust as the beneficiary of her Genworth Annuities. *Id.*

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DETERMINED THAT UNDISPUTED FACTS SHOWED THAT GENWORTH HAD PAID THE ANNUITIES TO THE BENEFICIARIES INTENDED BY BESS AND THEREFORE DESIA'S CONTRACT CLAIM MUST BE DISMISSED

(i) A District Court Should Grant a Motion for Summary Judgment As a Matter of Law Where There Exist No Genuine Issues of Material Fact that Would Permit a Reasonable Jury to Find for the Non-Movant

A motion for summary judgment should be granted as a matter of law where the moving party has proved that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ P. 56(c). A dispute regarding a material fact is only "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587 (1986). A court must grant a motion for summary judgment, if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law governing the case will identify those facts that are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the

entry of summary judgment." *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006).

The party moving for summary judgment is initially responsible for demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323; *Holcomb v. Iona College*, 521 F.3d 130, 137 (2d Cir. 2008). Then the onus shifts to the party resisting summary judgment to present evidence sufficient to satisfy every element of her claim. *Id.* at 137; Fed. R. Civ. P. 56. Once the movant has met its burden, the non-movant may not rest on mere allegations of a dispute of material fact. As set forth in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, the non-movant must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586. She must come forward with "specific facts showing that there is a *genuine issue for trial.*" *Id.* at 587, (emphasis in original). If the evidence put forward by the non-movant is merely "colorable," the motion should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50.

(ii) Genworth Met Its Burden to Show that There Were No Issues of Material Fact Concerning The Issue of Whether Bess' Sisters Were The Rightful Beneficiaries Of The Annuities

As Desia agrees, the intent of the policyholder governs the question of the identity of the rightful beneficiary and, if a carrier pays the rightful beneficiary, there can be no liability. App. 13a, *citing Bigley v. Pacific Standard Life Insurance Co.*, 229 Conn. 459, 463-464 (1994). The District Court properly determined that Genworth had presented facts that showed it paid the proceeds of the Genworth Annuities to the beneficiaries intended by Bess: her sisters Bennett and Palozzi.

As set forth above, there were two Genworth Annuities, one qualified and one non-qualified. Pursuant to the Estate Plan that Saviano created for Bess, Bess intended that the beneficiary of the qualified annuity, as well as Bess' other qualified holdings, be changed to her Estate. No changes were to be made to the beneficiaries of the non-qualified Genworth Annuity or any of Bess' other non-qualified holdings. No beneficiary was to be changed to the Solomon Trust.

Bess told Saviano to make sure that Stewart "knew what to do on her death beneficiary designations." Saviano then sent Stewart a letter, which he copied to Bess, stating "it is important that the death beneficiary of all qualified retirement savings are her estate." Bess did not correct or object to anything in the letter and that letter did not mention the Solomon Trust.

When Stewart presented Bess with blank change of beneficiary forms, and Bess signed those forms, Bess said "make sure you talk to [Saviano] to find out, you know, where the -- where these annuities – which annuities and who are the beneficiaries supposed to be changed to."

Based upon the foregoing undisputed facts, irrespective of Stewart's mistakes, the District Court properly determined that Bess intended that the beneficiaries of the non-qualified Genworth Annuity should always have been Bennett and Palozzi. The beneficiary of the qualified Genworth Annuity initially should have been changed to the Estate, of which Bennett and Palozzi were beneficiaries. Because the sole reason for changing beneficiaries on the Annuities to the Estate was to fund the Unitrust and the Unitrust ultimately did not qualify under I.R.S. rules, the Unitrust was voided. The original beneficiaries, Bennett and Palozzi, who Bess had always intended to be beneficiaries of the Genworth Annuities, were then reinstated. Under any circumstances, these facts provided no basis for any reasonable inference that Bess intended to change the beneficiary of either Genworth Annuity to the Solomon Trust.

Thus, the District Court correctly found that, by paying the proceeds of the Genworth Annuities to Palozzi and Bennett, and not to the Solomon Trust, Genworth complied with Bess' intent.

(iii) Desia Failed to Meet Her Burden to Raise a Genuine Issue of Material Fact Once the Court Determined that Bess' Sisters Were The Rightful Beneficiaries Of The Annuities

As the District Court correctly found, Desia did not present evidence sufficient to satisfy every element of her claim. In support of the petition, Desia argues that that the District Court disregarded material facts showing that (i) the change of beneficiary forms for the Genworth Annuities were not blank when Bess signed them, but rather that a jury might infer that the forms indicated that the beneficiaries were being changed to the Solomon Trust, (Petition page 10), (ii) that defendants created documents using the term "Barbara Bess Trust" as a shorthand for the Solomon Trust, *Id.* and (iii) Bess allegedly asked whether Desia, the trustee of the Solomon Trust, needed to sign the change of beneficiary forms. *Id.*

As the District Court found, the evidence, including the testimony of Desia and Solomon, that the forms were blank was "uncontradicted." Decision, App. 17a. In the face of such evidence, Desia's allegation that it was not Bess' general "practice" to sign documents in blank, nor typical of her general "hands-on" approach to her Estate, is not sufficient to create a genuine issue of material fact with respect to the contents of these particular forms. (JA 404, p. 11.) As explained above, efforts to concoct "some metaphysical doubt as to the material facts" are insufficient to defeat summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. at 586.

Desia also argues that because certain documents relating to the Solomon Trust, presented as Exhibits A through F to the Reply Memorandum in the District Court (the "Reply Memorandum") (AA 204-220), contain the words "Barbara Bess Trust," this indicates somehow that Stewart intended the words "Barbara Bess Trust" to mean the "Solomon Trust." Petition p.10. As the District Court correctly determined, however, even if that were true, Bess' intent governs and Stewart's understanding of the term is irrelevant. (JA 403-404, pp. 10-11).

In any event, Desia's allegation with regard to these documents is misleading because no document uses only the words "Barbara Bess Trust" in reference to the Solomon Trust. Each of the documents cited by Petitioner uses additional qualifying language, such as "f/b/o Julius Solomon," specifically identifying that the trust referenced in the document as the Solomon Trust. As the Decision noted, none of the documents referenced by Petitioner identify the Solomon Trust by the words "Barbara Bess Trust" alone. (*See* Decision, App.30a, note 8.)

The District Court also correctly determined that Bess' purported question concerning whether Desia should sign the change of beneficiary forms for the Genworth Annuities did not create a genuine issue of fact as to Bess' intent concerning the beneficiaries of those annuities. (JA 404-405, pp. 11-12.)

A non-movant cannot defeat a motion for summary judgment simply by arguing that questions relating to a person's "intent" create a genuine issue of fact. "Mere

incantation of intent or state of mind does not defeat otherwise valid summary judgment." *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 711 (2d Cir. 1991), *citing Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). The summary judgment rule would be rendered "sterile" if a simple statement that there is an issue concerning a person's "intent or state of mind" operated as a "talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d at 998.

As stated above, the undisputed evidence is that Bess and Saviano agreed that only the beneficiaries of the qualified annuities would be changed to Bess' Estate. Moreover, although Desia was the sole Trustee and fiduciary of the Solomon Trust and she spoke to Solomon daily, for more than three years after Bess died, Desia never made any attempt to discover whether the Solomon Trust had received the assets from the Genworth Annuities. Thus Bess' alleged remark to Desia did not cause Desia to raise the issue with Solomon or to question why the Genworth Annuities never appeared on the Solomon Trust account statements she was receiving from AGE. (JA 233-234, Desia Tr. 125-128.)

In light of the foregoing, the District Court correctly found that, drawing all inferences in favor of Desia, her bare, uncorroborated allegation that Bess asked a question about whether Desia should sign the change of beneficiary forms is insufficient to raise a genuine issue of material fact that would permit a reasonable jury to find that Bess intended to change the beneficiary of the annuities from her sisters to the Solomon Trust. *See Citizens Bank of Clearwater*, 927 F.2d at 711.

POINT II

DESIA'S ARGUMENTS CONCERNING STEWART'S CREDIBILITY DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT

Once a defendant has made a properly supported motion for summary judgment, the plaintiff may not overcome such a motion with general attacks upon a person's credibility. *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). A non-movant may not "defeat a motion for summary judgment" by relying "on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996); *McCullogh v. Wyndach Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999).

If the most that can be hoped for is the "discrediting of defendants' denials at trial no question of material facts is presented." *Modern Homes Inst., Inc., v. Hartford Accident Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975). A plaintiff may not "defeat a defendant's properly supported motion for summary judgment" without "offering any concrete evidence from which a reasonable jury could return a verdict" in plaintiff's favor, by merely asserting that the jury might disbelieve the defendant and without offering "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-7. Rather, a non-movant must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive. *Crawford-El v. Britton*, 523 U.S. at 600; *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

Broad, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact. *Island Software & Computer Service, Inc. v. Microsoft Corp.* 413 F.3d 257, 261 (2d Cir. 2005), *citing Crawford-El v. Britton*, 523 U.S. at 600. Once the movant has supported a motion, the non-moving party may not simply rest on the hope of discrediting the movant's evidence at trial. *United States v. Real Property*, 480 F.3d 841, 844 (8th Cir. 2007).

Summary judgment is "particularly appropriate where, notwithstanding issues of credibility, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor; in this situation, it may be said that the record as a whole points in one direction and the dispute is not genuine." *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998).

The petition alleges that in determining that it was Bess' intent that her sisters be the beneficiaries of the Genworth Annuities the lower courts "rel[ied] solely on the credibility of Stewart." Petition at pg. 18. This allegation has no merit. As the District Court determined, Genworth had presented evidence sufficient to show that there was no genuine issue as to any material fact that would permit a reasonable jury to find that it was not Bess' intent to bequeath the Genworth Annuities to her sisters. As Petitioner presented no evidence to contradict this determination, as a matter of law, she can not defeat the motion by attacking a witness' testimony on issues collateral to the intent of Bess.

The evidence presented by Genworth demonstrated that Bess intended that Bennett and Palozzi – and not the Solomon Trust — receive the Genworth Annuities. This was established through sources other than Stewart. Those sources include (i) Saviano's undisputed testimony concerning (a) his discussion with Bess about changing the beneficiaries of certain of her annuities to her Estate, (b) Bess' directive that Saviano inform Stewart of those changes and (c) the fact that Saviano and Bess never discussed changing the beneficiaries of the Genworth Annuities, or any other annuities, to the Solomon Trust; (ii) Saviano's letter to Stewart, which was copied to Bess, confirming that certain beneficiaries were to be changed to her Estate (and not to the Solomon Trust); (iii) admissions by Desia and Solomon that they never discussed with Bess any plan to make the Solomon Trust the beneficiary of the Genworth Annuities or any other annuities; (iv) admissions by Desia and Solomon that they saw no language on the change of beneficiary forms that Bess signed other than Bess' signatures; and (v) the fact that, for more than three years after Bess' death, Desia never took a single step to check whether the Solomon Trust had received the Genworth Annuities, as Desia purportedly expected.

Because the facts establish Genworth's entitlement to summary judgment through sources independent of Stewart's testimony, the Second Circuit properly found that allegations concerning Stewart's testimony could not possibly warrant reversal of the District Court's decision.

Desia's primary argument concerning credibility is based upon alleged inconsistencies between the facts stated in the Stewart Affidavit and his deposition testimony, which Stewart characterized as "embellishments."[9] (App. Br. 30-32). Those inconsistencies, however, were "minor and immaterial to the central issues in the case," i.e., Bess' intent with respect to the beneficiaries of the Genworth Annuities, and they do not amount to "falsehoods that call [Stewart's] testimony about Dr. Bess' intent into question." (JA 409-410, pp. 16-17.) Moreover, there is no support for Desia's conclusion that that these inconsistencies regarding collateral issues were intentional misstatements.

Finally, Petitioner's argument that Stewart may have colluded with Saviano is unsupported by a single document or any other evidence. As stated above, a plaintiff may not defeat a defendant's properly supported motion for summary judgment without "offering any concrete evidence from which a reasonable jury could return a verdict" in plaintiff's favor, by merely asserting that the jury might disbelieve the defendant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-7. Because Desia presented no evidence to support her "conspiracy" theory, the theory has no bearing on Stewart's credibility.

9. Stewart did not write the affidavit which was prepared for his signature by AGE. (JA 294, Stewart Tr. 146.) Moreover, when Plaintiff asked what Stewart meant by the word "embellishments" Stewart stated that "in retrospect" he had concerns about how the affidavit was "worded." (JA 292, Stewart Tr. 134.).

CONCLUSION

Respondent Genworth respectfully requests that the judgment of the Second Circuit be affirmed.

Respectfully submitted,

ANDREW W. SIDMAN
Counsel of Record
DAVID G. SMITHAM
BRESSLER, AMERY & ROSS, P.C.
17 State Street, 34th Floor
New York, NY 10004
(212) 425-9300
asidman@bressler.com

Attorneys for Respondent